

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1912

No. 15

JAMES H. McGOVERN, PLAINTIFF IN ERROR,

THE CITY OF NEW YORK.

IN THE SUPREME COURT OF THE STATE OF NEW YORK

FILED NOVEMBER 20, 1912

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 395.

JAMES P. McGOVERN, PLAINTIFF IN ERROR,

v8.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print
Caption	a	1
Case on appeal to court of appeals	1	1
Statement under rule 41.....	1	1
Notice of appeal	2	2
Petition for the appointment of commissioners of appraisal....	4	3
Order appointing commissioners	17	11
Notice of claim.....	21	13
Evidence for claimant.....	22	13
Testimony of Charles N. Chadwick	22	14
Frank Burhans.....	30	18
Charles O. Vogt	31	18
Charles O. Vogt (recalled).....	40	25
Thomas P. Rice.....	64	44
J. Waldo Smith	65	45
Frederick Stephan, Jr.....	68	46
J. Waldo Smith (recalled)	69	47
Offers to prove.....	73	49
Evidence for petitioner.....	87	57
Testimony of Joseph S. Hill.....	87	57
James McMillan.....	100	66
Joseph S. Hill (recalled).....	106	70

	Original.	Print
Evidence for claimant.....	107	71
Testimony of Lawrence Kenney.....	107	71
Testimony of Hewitt Boice.	110	74
Evidence for petitioner.....	111	74
Testimony of Asa Barton.....	111	74
Testimony of James E. O'Neil.....	112	75
Agreement as to evidence of Hugh Donihue.....	112	75
Claimant's Exhibit A—Deeds, Hogan to Aaron, September 12, 1906 (not set out).....	113	76
Claimant's Exhibits B and C—Bond and mortgage, Aaron to Hogan, September 12, 1906 (not set out).....	113	76
Claimant's Exhibit D—Satisfaction of mortgage of September 12, 1906, dated April 7, 1907 (not set out).....	113	76
E—Deed, Aaron to McGovern (not set out).....	114	76
F—Map of property.....	114	76
G—(Not set out).....	114	77
Claimant's Exhibits H and I—Bond and mortgage by Van Velsen to Home Seekers' C. and L. Association (not set out).....	114	77
Claimant's Exhibit J—Photograph of house (not set out).....	114	77
K—Photograph of barn (not set out).....	114	77
Petitioner's Exhibits 1, 2, 3, 4, and 5—Photographs of build- ings erected on parcel 246.....	114	77
Bill of costs and disbursements.....	115	77
Report of commissioners.....	117	79
Objections to report.....	131	87
Order of confirmation.....	136	90
Stipulation as to exhibits.....	158	103
Stipulation as to proceedings.....	159	103
Opinion of Betts, J.....	160	104
Waiver of certification.....	168	109
Order of affirmance in appellate division.....	169	109
Judgment of affirmance in appellate division.....	171	110
Notice of appeal to court of appeals.....	173	111
Opinion of appellate division.....	175	112
Stipulation waiving certification.....	182	116
Clerk's certificate to case on appeal.....	182	116
Remittitur from court of appeals.....	183	117
Notice of filing remittitur, &c.....	185	118
Order on remittitur.....	186	120
Judgment on remittitur.....	188	121
Petition for writ of error.....	190	123
Assignment of errors.....	195	125
Bond on writ of error.....	202	129
Citation.....	205	133
Writ of error.....	208	134
Clerk's certificate.....	213	135

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Court of Appeals, State of New York.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure Water for the Use of the City of New York; JAMES P. MCGOVERN, Claimant-Appellant.

Original.

Case on Appeal.

Parcel 246, Section 6.

Jerome H. Buck, Attorney for Claimant-Appellant, 165 Broadway, New York City.

Francis K. Pendleton, Corporation Counsel, Attorney for Respondent, Hall of Records, New York City.

1

Supreme Court, Third Department.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir, Parcel 246, Section 6, Ulster County.

Statement under Rule 41.

This proceeding was commenced by the filing of a petition on the 29th day of June, 1907. On the 3rd day of July, 1907, Commissioners of Appraisal were duly appointed. On the 22nd day of July, 1907, the first meeting of the Commission was held, and the oaths of the commissioners were duly filed upon the said day. On the 6th day of November, 1907, the claimant, James P. McGovern, filed a statement of his claim. In or about the month of May, 1908, J. Edward Simmons resigned as one of the Board of Water Supply, and thereafter John A. Bensele was appointed Commissioner in his place and stead. William B. Ellison, Corporation Counsel, appeared as attorney for the Petitioners. After the commencement of this proceeding, Francis K. Pendleton was ap-

2

pointed Corporation Counsel in the place and stead of William B. Ellison, and thereafter appeared for the Petitioners. Jerome H. Buck appeared as attorney for the claimant, James P. McGovern. Except as above stated, there *has* been no changes of parties or attorneys pending the proceeding.

Notice of Appeal.

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Towns of Olive, Marbletown, and Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir, Section No. 6, Parcel No. 246.

SIRS: Please Take Notice that the claimant, James P. McGovern, for parcel No. 246, in Section No. 6 of the Ashokan Reservoir, hereby appeals to the Appellate Division of the Supreme Court, to be held in and for the Third Judicial Department, from the order of the Supreme Court, Ulster County, confirming the first separate report of Hon. Edgar L. Fursman, Edgar H. Nicoll and Charles B. Cox, Commissioners of Appraisal for Section No. 6, in the Ashokan Reservoir, which said order of confirmation was filed in the office of the Clerk of the County of Ulster, on the 17th day of April, 1908, and also from the appraisal and report of the aforesaid Commissioners, and the said claimant, James P. McGovern, appeals from each and every part of the said order, appraisal and report as far as the same affect Parcel No. 246 in Section No. 6, except that part relating to the mortgage on the aforesaid parcel.

Dated, New York, July 6, 1908.

Yours, etc.,

JEROME H. BUCK,
Attorney for Claimant.

O. & P. O. Address, 165 Broadway, Borough of Manhattan, City of New York.

To Francis K. Pendleton, Esq., Corporation Counsel; County Clerk of Ulster County, Kingston, N. Y.

4 *Petition for the Appointment of Commissioners of Appraisal.*

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir, Section No. 6.

To the Supreme Court of the State of New York, Third Judicial District:

The petition of the Board of Water Supply of The City of New York respectfully shows to the Court and alleges for and on behalf of said City:

On the third day of June, 1905, an act of the Legislature was passed, known as chapter 724 of the Laws of 1905, entitled "An Act to provide for an additional supply of pure and wholesome water for The City of New York and for the acquisition of lands or interest therein and for the construction of the necessary reservoirs, dams, aqueducts, filters and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects."

5 On the 9th day of June, 1905, the Hon. George B. McClellan, Mayor of The City of New York, acting under and in pursuance of the power and authority vested in him by said act, appointed J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw commissioners, for the purpose of carrying out the provisions of said act. They accepted such appointment duly organized and immediately entered upon the discharge of their duties, and have been and now are engaged in the discharge of their duties as such commissioners under said act and the various acts amendatory thereof and relating thereto.

The Board of Water Supply, in carrying out the provisions of said act, did immediately and with all reasonable speed, proceed to ascertain what sources did exist and were the most available, desirable and best for an additional supply of pure and wholesome water for The City of New York. The Board of Water Supply, in the discharge of the duties placed upon them by such act, have made such surveys, maps, plans, specifications, profiles, estimates and investigations as they deemed proper in order to ascertain the facts as to said sources of supply, that a report might be made by said Board of Water Supply, as required by law, to the Board of Estimate and Apportionment, with recommendations as to what action should, in its opinion, be taken with reference thereto, so that the Board

of Water Supply and the Board of Estimate and Apportionment might be enabled to determine from what source or sources and in what manner The City of New York might best secure an additional supply of pure and wholesome water.

6 In accordance with the provisions of such statute the Board of Water Supply did submit to the Board of Estimate and Apportionment of The City of New York a report, bearing date October 9, 1905. Said report was accompanied by a general map or plan of the reservoirs and the aqueducts to be constructed, including the real estate hereinafter described, in the manner and form prescribed by law, which map bears date October 9, 1905, and requested the consideration and adoption of the maps and plans so submitted.

The Board of Water Supply further shows that on the receipts of the said report, maps, plans, profiles, etc., by the Board of Estimate and Apportionment, the said Board of Estimate and Apportionment passed a resolution on October 12, 1905, fixing October 27, 1905, at half past ten o'clock in the forenoon, at Room 16, in the City Hall, in The City of New York, as the time and place for a public hearing, and directed that public notice be given of such hearing by publication thereof in the official City papers (except all borough papers) and in the "Herald," "Times," "Tribune" and "Press."

The Board of Water Supply further shows that the said Board of Estimate and Apportionment, in pursuance of such resolution, in order to afford all persons interested in the property affected by the said report, maps, plans, profiles, etc., reasonable opportunity to be heard respecting the said report, maps, plans and profiles, gave the said notice of such hearing, and in addition gave notice of such hearing as required by law to the Chairman and Clerk of each of the Boards of Supervisors of the Counties where the real estate to be acquired was situated at least eight days before the 27th day of October, 1905, and among others so notified was the Chairman and Clerk of the Board of Supervisors of the County of Ulster, and further that the Board of Estimate and Apportionment caused the notice of such hearing to be published in all the papers specified and referred to as above, being the "City Record" and the

7 official City papers, the "Herald," "Times," "Tribune" and "Press," all published in The City of New York, and in all papers designated by the respective County clerks of the several counties as the papers in which official notices are to be published.

Such public hearing was held on the said 27th day of October, 1905, at 10:30 A. M., at Room 16, in said City Hall. The Board of Estimate and Apportionment met pursuant to said notice, and a public hearing was afforded to all persons interested in the matter and a reasonable opportunity to be heard was afforded to all. At this hearing the said report, with the map, plan and profiles accompanying the same, were considered and due deliberation had thereon, and no one appearing in opposition, but many in favor of said report, map, plan and profile, the said Board of Estimate and Apportionment did on such 27th day of October, 1905, at such public hearing

lastly hereinbefore mentioned unanimously adopt the following resolution:

"Resolved, That the Board of Estimate and Apportionment does hereby approve and adopt said report and the map, plan and profile accompanying the same, bearing the date of October 9, 1905, and presented by the Board of Water Supply of The City of New York, for obtaining an additional supply of pure and wholesome water for The City of New York, and does direct that the said map, plan and profile be executed, signed, certified and filed as directed by section 3 of chapter 724 of the Laws of 1905, and does hereby declare the same to be the final map, plan or plans approved and adopted by the Board of Estimate and Apportionment as provided in said section. And be it further resolved that The City of New York make application by petition in writing to the State Water Supply Commission as speedily as possible for the approval of said maps and profiles of the said proposed new or additional source or sources of water supply

8 of The City of New York, pursuant to Chapter 723 of the Laws of 1905, and that the Corporation Counsel be and hereby is requested to prepare such papers and take such steps with that end in view as may be proper."

After the passage of the resolution by the Board of Estimate and Apportionment approving said map and plan, a final map or plan approved and adopted by the Board of Estimate and Apportionment was executed in quadruplicate, one of which remains on file with the Clerk of the Board of Estimate and Apportionment of New York, one was placed on file in the office of the Board of Water Supply of The City of New York, a copy thereof was filed in the office of the Commissioner of Water Supply, Gas and Electricity. On November 10, 1905, a copy of said final map or plan so executed and approved by the said resolution was filed in the office of the County Clerk of the County of Ulster. Said map is entitled "Board of Water Supply of The City of New York, dated October 9, 1905, signed by J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, Commissioners, Board of Water Supply, J. Waldo Smith, Chief Engineer, John R. Freeman, William H. Burr, and Frederick P. Stearn, Consulting Engineers."

Said map so filed as aforesaid was not the original, but was a certified copy thereof as permitted by the law, and bears the following certificate, signed by J. W. Stevenson, the then secretary of the Board of Estimate and Apportionment: "I hereby certify that this is a true copy of a map and profile showing sources of and manner of obtaining an additional supply of water for The City of New York. Prepared by the Board of Water Supply of The City of New York in pursuance of the provisions of chapter 724 of the Laws of 1905, and approved by the Board of Estimate and Apportionment, on the 27th day of October, 1905."

In pursuance of the resolution of the Board of Estimate and apportionment hereinbefore referred to, passed on October 27, 1905, after the close of the public hearing and after all persons
9 interested had been afforded an opportunity to be heard a petition in writing was duly presented to the State Water Supply

Commission, in the manner and form required by law for the approval, by the State Water Supply Commission of the map, plan and profile as prepared and submitted by the Board of Water Supply and approved by the Board of Estimate and Apportionment October 27, 1905, which map, plan, profile, survey and description includes the property described in this petition.

The State Water Supply Commission, in pursuance of the authority in them vested by law, did comply with the terms of the statute and did give the notices of public hearing required by law and did make an examination of the map, plan and profile of the aqueduct and the various reservoirs and did give the same due consideration.

On or about the 14th day of May, 1906, the State Water Supply Commission made a decision in writing, and signed the same as required by law, approving the said final map, plan, survey and profile and the general scheme or plan of taking water from the Catskill Mountains, commonly known as the Catskill aqueduct supply, as shown on said map and plan, so filed in the County Clerk's office of Ulster County on November 10, 1905.

Such decision so made as aforesaid was filed, together with all maps, plans, surveys, and all other papers relating thereto, in the office of the State Water Supply Commission of the State of New York, and that all the provisions of Chapter 723 of the Laws of 1905, as amended, were duly complied with by the State Water Supply Commission prior to making such decision and approval.

On the 24th day of April, 1907, the Board of Water Supply prepared six similar maps of this section of the reservoir, each of which is entitled "Board of Water Supply of The City of New York, map of real estate situated in the Town of Hurley, County of 10 Ulster, and State of New York, to be acquired by The City of New York under the provisions of chapter 724 of the Laws of 1905, as amended, for the construction of Ashokan Reservoir and appurtenances in the vicinity of Ashton, south of railroad."

Said six similar maps and plans were duly signed and certified by the Board of Water Supply and their chief engineer on April 24, 1907, and approved by the Board of Estimate and Apportionment on the 3d day of May, 1907.

After the said maps were so adopted and approved they were transmitted to the Corporation Counsel of The City of New York, with a certificate of such approval written thereon and signed by the Board of Water Supply and a majority of the Board of Estimate and Apportionment.

The Corporation Counsel caused one of said maps so approved to be filed in the office of the County Clerk of the County of Ulster on the 8th day of May, 1907.

Upon said map so filed as aforesaid there is laid out and numbered the parcels of real estate on which it is necessary to construct and maintain the reservoir and which it is necessary to acquire for the prosecution of the work authorized by this act, all of said parcels are to be acquired in fee and are colored pink on said map, filed May 8, 1907. Each of said six similar maps shows the natural and artificial division lines existing on the surface of the soil at the

time of the survey, and there is plainly indicated thereon that the fee to each of the parcels of real estate hereinafter described is to be acquired.

The Board of Water Supply further shows that the real estate to be acquired herein is necessary for the purpose of constructing, maintaining and operating the reservoir, aqueduct, culverts, sluices, tunnel and the various appurtenances for the purpose of conveying water to The City of New York.

In case any property hereinafter described is used for any public purpose such as a highway, etc., such public use shall continue until the City of New York shall have the legal right to take possession of or change the same.

In giving the names of the claimants to the various parcels hereinafter set forth, shown on the map hereinafter referred to, as filed in Ulster County Clerk's office May 8, 1907, such names so far as they appear upon said map are given as a matter of reference or convenience and as persons who may claim to own the same, but no admission is made that such persons own the property at the time of the verification of this petition, or that their title or titles are clear, or that they have any interest therein.

The following is a description of all the real estate to be acquired on behalf of The City of New York for the purposes of this act, in this particular proceeding as shown on the map hereinafter referred to. Each of the parcels is to be acquired in fee, the title to vest in The City of New York as prescribed by law:

All those certain pieces or parcels of real estate, as the term real estate is defined in said act, situated in the Town of Hurley, County of Ulster and State of New York, shown on a map entitled, "Reservoir Department. Section No. 6. Board of Water Supply of The City of New York. Map of real estate situated in the Town of Hurley, County of Ulster and State of New York, to be acquired by The City of New York, under the provisions of chapter 724 of the Laws of 1905 as amended, for the construction of Ashokan Reservoir and appurtenances in the vicinity of Ashton, south of railroad." which said map was signed by the Board of Water Supply, April 24, 1907, and approved by the Board of Estimate and Apportionment, May 3, 1907, and was filed in the office of the County Clerk of the County of Ulster, at Kingston, in said county, on the 8th day of May, 1907.

Parcel No. 223, George Terwilliger, Claimant, containing 68.302 acres.

12 Parcel No. 224, Wm. Urban, Claimant, containing 26.590 acres.

Parcel No. 225, Unknown, Claimant, containing 1.148 acres.

Parcel No. 226, Wm. Urban, Claimant, containing 53.022 acres.

Parcel No. 227, Lewis Hogan, Claimant, containing 132.296 acres.

Parcel No. 228, F. Hales, Sr., Claimant, containing 0.264 acre.

Parcel No. 229, A. J. Angevine, Claimant, containing 37.870 acres.

Parcel No. 230, Stephen Angevine, Claimant, containing 45.373 acres.

Parcel No. 231, Louisa Everett, Claimant, containing 4.811 acres.

Parcel No. 232, Edward Schnepf, Claimant, containing 25.511 acres.

Parcel No. 233, Burr Lamphere, claimant, containing 64.809 acres.

Parcel No. 234, Daniel Simmons, claimant, containing 3.168 acres.

Parcel No. 235, Daniel Elmendorf, claimant, containing 3.712 acres.

Parcel No. 236, H. Terwilliger, claimant, containing 5.900 acres.

Parcel No. 237, F. Hales, Sr., claimant, containing 25.040 acres.

Parcel No. 238, Euphemia Markle, claimant, containing 15.408 acres.

Parcel No. 239, W. J. Jones, claimant, containing 97.657 acres

Parcel No. 240, Stephen Phillips, claimant, containing 0.097 acre.

Parcel No. 241, Dewitt Ballard, claimant, containing 105.746 acres.

Parcel No. 242, E. M. Markle, claimant, containing 60.243 acres.

13 Parcel No. 243, Unknown, claimant, containing 0.523 acre.

Parcel No. 244, Joseph Chase, Claimant, containing 17.861 acres.

Parcel No. 245, Lydia A. Wood, claimant, containing 40.781 acres.

Parcel No. 246.

Jacob Hogan, Claimant.

All that certain piece or parcel of real estate situated in the Town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel Number 246, which said parcel is described as follows:

Beginning at the north-east corner of parcel No. 241, in the southerly line of parcel No. 251, at the intersection of the center lines of the Ulster & Delaware Plank Road and a road leading from Browns Station to said Plank road, and running thence along the said southerly line and the centre line of said Plank Road, N. 83° 13' E. 101.3 feet and N. 78° 57' E. 51.5 feet to the southwest corner of parcel No. 252; thence along the southerly line of said parcel and still continuing along the center line of said Plank Road, N. 78° 57' E. 40.4 feet and N. 67° 41' E. 174 feet to the northwest corner of parcel No. 253; thence along the westerly line of said parcel, S. 41° 38' E. 648.7 feet to the southwest corner of same; thence along the southerly line of said parcel, N. 67° 20' E. 272.7 feet to the south-east corner of same, in the westerly line of parcel No. 254; thence along the said westerly line, S. 41° 39' E. 1747. feet to the most southerly point of said parcel; thence on a curve of 2550. feet radius to the right 102.4 feet, S. 39° 46' W. 236.6 feet, on a curve of 461.9

feet radius to the left 123.1 feet to the most easterly point of parcel No. 269; thence along the easterly line of said parcel, N. 44° 32' W. 1010. feet to the northeast corner of same; thence along the northerly line of said parcel, S. 50° 53' W. 254.7 feet to the northwest corner of same; thence along the westerly line of said parcel, S. 43° 48' E. 1084. feet to the most southerly point of same; thence on a curve of 450. feet radius to the right 150.5 feet and S. 71° 17' W. 354.3 feet to the southeast corner of parcel No. 245; thence along the easterly line of said parcel, N. 44° 06' W. 1906. feet to the southeast corner of parcel No. 247; thence along the easterly line of said parcel N. 44° 06' W. 113. feet to the most northerly point of said parcel, in the easterly line of before mentioned parcel No. 241, said point being in the center of before mentioned road leading from Browns Station to the Ulster & Delaware Plank Road; thence along the center line of said road and the said easterly line, the following courses and distances; N. 19° 30' E. 73.7 feet, N. 5° 02' E. 288.9 feet, N. 5° 17' E. 430.4 feet and N. 10° 56' E. 128. feet to the point or place of beginning; containing 60.459 acres.

Parcel No. 247, School Prop., Olive Branch, claimant, containing 0.314 acre.

Parcel No. 248, Henry Bush, claimant, containing 0.757 acre.

Parcel No. 249, Richard Hogan, claimant, containing 0.328 acre.

Parcel No. 250, F. Van Velsen, claimant, containing 1.521 acres.

Parcel No. 251, Minnie Mulligan, claimant, containing 27.336 acres.

Parcel No. 252, J. Moylan, claimant, containing 23.723 acres.

Parcel No. 253, D. McAuliff, claimant, containing 3.834 acres.

Parcel No. 254, Richard Smith, claimant, containing 67.729 acres.

Parcel No. 255, Mary Ann Bell, claimant, containing 2.005 acres.

15 Parcel No. 256, Mrs. Bogart, claimant, containing 0.600 acre.

Parcel No. 257, Chas. Pierson, claimant, containing 23.632 acres.

Parcel No. 258, Jas. Miller, claimant, containing 13.768 acres.

Parcel No. 259, Chester Pierson, claimant, containing 20.794 acres.

Parcel No. 260, Jacob Dubois, claimant, containing 8.653 acres.

Parcel No. 261, Kenear, claimant, containing 0.220 acre.

Parcel No. 262, Kenear, claimant, containing 23.047 acres.

Parcel No. 263, A. Dumond, claimant, containing 0.358 acre.

Parcel No. 264, Oliver Hughes, claimant, containing 9.809 acres.

Parcel No. 265, Ulster Co. Savings Bank, claimant, containing 6.453 acres.

Parcel No. 266, Ulster Co. Savings Bank, claimant, containing 1.280 acres.

Parcel No. 267, Wm. Hughes, claimant, containing 0.144 acre.

Parcel No. 268, J. Quinn, claimant, containing 30.642 acres.

Parcel No. 269, Edward Swayze, claimant, containing 6.341 acres.

The Board of Water Supply further shows to the Court and alleges that it has taken all the steps and discharged all the duties imposed

upon said Board of Water Supply to entitle the petitioner to the relief prayed for.

Wherefore, The Board of Water Supply, for and on behalf of The City of New York and for the purpose of vesting the fee of the lands hereinbefore described in said City, prays this Honorable Court to make an order for the appointment of three disinterested and competent freeholders, at least one of whom shall reside in the

County of New York, and at least one of whom shall reside
16 in the county where the real estate sought to be acquired is situated. Commissioners of Appraisal to ascertain and appraise the compensation to be made to the owners of and all persons interested in the real estate laid down on said maps as proposed to be taken or affected for the purposes indicated in said act and to exercise and discharge all the powers and duties conferred upon Commissioners of Appraisal by said act or the acts amendatory thereof or relating thereto.

And your petitioner further prays that the Court shall in said order appointing such Commissioners fix the time and place of the first meeting of said Commissioners, and grant such other and further relief as may be just.

Dated June 25, 1907.

BOARD OF WATER SUPPLY,
By CHARLES A. SHAW, *Commissioner*.

STATE OF NEW YORK,
County of New York, ss.

Charles A. Shaw, being duly sworn, deposes and says that he is a member of the Board of Water Supply of The City of New York; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the knowledge of deponent except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That this verification is made by deponent in pursuance of a resolution of the Board of Water Supply authorizing the verification of this petition to be made by deponent as required by law.

CHARLES A. SHAW.

Sworn to before me this 25th day of June, 1907.

CHAS. E. MARR,
Commissioner of Deeds, City of New York.

17

Order Appointing Commissioners.

Supreme Court.

At a Special Term of the Supreme Court held in and for the Third Judicial District, at the City Hall, in the City of Albany, Albany County, New York, on the 29th day of June, 1907.

Present: Hon. James A. Betts, Justice.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir. Section 6. Ulster County.

On reading and filing the petition of the Board of Water Supply of the City of New York, verified by Charles A. Shaw, on June 25th, 1907, for and on behalf of said Board of Water Supply of the City of New York, from which it appears that the acquisition of
18 the real estate described in said petition and shown on the map therein referred to, which said map was filed in the Ulster County Clerk's office on the 24th day of April, 1907, is necessary for the purpose of providing an additional supply of pure and wholesome water for the City of New York, and for the construction, operation and maintenance of the reservoir, aqueduct, culverts, tunnels and various appurtenances as set forth in said petition, and it further appearing that due and proper notice of this application has been given by posting as required by the act as more fully appears by the affidavit of Frederick Ward, verified May 20th, 1907, showing the posting of 37 copies of the notice of this application in hand bill form in at least 37 conspicuous places on or in the vicinity of the real estate to be taken or affected, and it further appearing that notice of this application has been given by publication as required by said act, and the Court being satisfied that due and proper notice of the application herein has been given by posting and publishing as required by said act, and all provisions of said act have been complied with.

Now after hearing William B. Ellison, corporation counsel of the City of New York, in favor of granting said application and petition, and Mr. Arthur A. Brown by Harrison T. Slosson, of counsel, for certain claimants; Messrs. A. C. & F. W. Hottenroth, of counsel for certain claimants; Mr. Jerome H. Buck and Mr. G. Herbert Cone, of counsel for certain claimants, and Mr. A. T. Clearwater and Mr. Charles W. Walton of counsel for certain claimants,

Now on motion of John J. Linson, of counsel for petitioner, it is Ordered that the said application be and the same hereby is granted, and it is

Further ordered, that Edgar L. Fursman, of the City of Troy, County of Rensselaer, and State of New York; Edward H. Nicoll, of the City and County of New York, and Charles B. Cox of the Village of Saugerties, Ulster County, New York, be, and they hereby are appointed commissioners of appraisal to ascertain and appraise the compensation to be made to the owners of and all persons interested in the real estate laid down on said map in this proceeding, filed in said Clerk's office as aforesaid, as proposed to be taken or affected for the purposes indicated in said act, and to exercise and discharge all the powers and duties conferred upon them under Chapter 724 of the Laws of 1905, and the acts amendatory thereof and relating thereto, and it is

Further ordered that the first meeting of said commissioners is to be held at the County Court House, in the City of Kingston, Ulster County, New York, on the 22nd day of July, 1907, at 11 o'clock A. M.

Enter in Ulster County.

JAMES A. BETTS,
Justice Supreme Court.

20

Testimony.

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York under Chapter 724 of the Laws of 1905, and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir. Section 6. Ulster County.

KINGSTON, N. Y., Nov. 6, 1907.

The Commission convened at the Court House, Kingston, N. Y., at 11 A. M.

Present: Hon. Edgar L. Fursman, Hon. Edward H. Nicoll, Hon. Charles B. Cox, Commissioners.

John J. Linson, Esq., appeared for the Corporation Counsel of the City of New York.

Edward A. Alexander, Esq., as counsel for Jerome H. Buck, Esq., appeared for the claimant, James P. McGovern.

Ellis B. Long, Esq., Clerk.

21 *Claim of James P. McGovern,*

Parcel No. 246.

Mr. ALEXANDER: I file notice of claim.

Notice of Claim.

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Towns of Olive, Marbletown and Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Section No. 6. Parcel No. 246.

To Hon. Edgar L. Fursman, Hon. Edward H. Nicoll, Hon. Charles B. Cox, Commissioners of Appraisal.

James P. McGovern, claimant of Parcel No. 246, does respectfully show and allege as follows:

22 First. That prior to and on the 22nd day of July, 1907, the said claimant was the owner of the fee and the appurtenances and in possession of all that parcel of land in Section 6, designated as Parcel No. 246, situate in the Town of Hurley, County of Ulster, State of New York, and that the said parcel is free from incumbrances, except a mortgage made by Franklin O. VanVelsen and wife to the Home Seekers and Co-operative Savings and Loan Association.

Second. That pursuant to Chapter 724 of the Laws of 1905 and the acts amendatory thereof, The City of New York has taken the said parcel for the purposes mentioned in the said act.

Third. That the acts of The City of New York, under and pursuant to the said act, have greatly damaged claimant, and claimant therefore asks for a hearing in support of the said claim, and that he be awarded just and equitable compensation therefor, together with his costs, compensation for his witnesses, disbursements and an allowance of Five per cent on the amount of the award, together with interest from the 22nd day of July, 1907.

JEROME H. BUCK,
Attorney for Claimant.

O. & P. O. Address, 299 Broadway, Borough of Manhattan, New York City.

The claimant opened the proceedings and offered the following evidence.

CHARLES N. CHADWICK, sworn for claimant, testified:

Examined by Mr. ALEXANDER:

Q. Where do you reside?

A. Brooklyn, N. Y.

Q. And what is your business?

A. Commissioner of the City of New York.

23

Q. Commissioner of what?

A. Board of Water Supply.

Q. (Presenting same) I show you a copy of the New York American, dated Monday, September 16, 1907, entitled "Syndicate Plans to Grab Millions on Ashokan Dam Deal;" I ask you if you gave out the information that led to that article?

Mr. LINSON: Objected to as immaterial and irrelevant.

The COURT: How is it material?

Mr. ALEXANDER: It is vitally material, as held by the Court of Appeals in the Nowack case, as showing an attempt on the part of a party to this litigation, one of the petitioners in this proceeding to influence public opinion against property owners in this section. We want to show that this article is full of absolutely false statements, and we are entitled to know who is giving this stuff out. If this man is we want to hold him responsible.

The CHAIRMAN: I will exclude the evidence.

Claimant excepted.

Q. Do you know Mr. James P. McGovern?

Mr. LINSON: To that I object as immaterial.

The CHAIRMAN: That may be material; he is the claimant here. I will allow him to answer that.

Petitioner excepted.

A. I have no recollection of ever having met the gentleman.

Q. Is it true or false that Mr. James P. McGovern ever had a bogus mineral spring on any property in the Ashokan reservoir district or elsewhere in the wide world?

Mr. LINSON: Objected to as immaterial.

Objection sustained. Claimant excepted.

24

Q. Is it true or false that James P. McGovern ever had a fake railroad on any property owned by him in the Ashokan reservoir district or elsewhere?

Same objection, ruling and exception.

Q. Did you not state to a newspaper reporter named Mr. Norcross, employed by the New York American, a lot of facts in relation to proceedings in condemnation proceedings pending right in this court, in the Supreme Court of Ulster County, for the purpose of influencing the commissioners of condemnation against various claimants here?

Mr. LINSON: Same objection.

The CHAIRMAN: Excluded.

Claimant excepted.

Q. Did you not write an editorial for the New York Tribune about this matter, for the purpose of influencing public sentiment against owners who were trying their cases in condemnation proceedings in the Supreme Court of Ulster County?

Same objection, ruling and exception.

Q. How long have you been a commissioner of the Board of Water Supply of the City of New York?

A. Since June 9, 1905.

Q. And what have your duties been since that time with respect to the business of the Board?

Mr. LINSON: I object to that as immaterial and irrelevant.

Objection sustained. Claimant excepted.

Mr. ALEXANDER: I now state to the Commission that I expect to show that it was under his supervision that estimates of the land were made up here.

The CHAIRMAN: Suppose it was?

Mr. ALEXANDER: Any estimates that were made would be an admission.

25 The CHAIRMAN: I do not think so. I will exclude it.
Claimant excepted.

Q. Was it one of your duties as a member of the Board of Water Supply to cause estimates as to the fair and reasonable market value of the land comprising portions of the Ashokan reservoir site to be made up?

Same objection. Objection sustained.

Claimant excepted.

Q. Now did you cause to be prepared, by persons who were competent to estimate the fair and reasonable market value of property in the Ashokan reservoir district, which the City of New York is now condemning in these proceedings, estimates of the fair and reasonable market value of such property?

Same objection, ruling, and exception.

Mr. ALEXANDER: I offer in evidence a deed dated the 12th day of September, 1906, made by Jacob M. Hogan and Lena Hogan, his wife, to Herman Aaron of the Borough of Manhattan, City and State of New York, comprising the property known as parcel No. 246.

Mr. LINSON: Is that the deed dated September 12, 1906, and recorded in Book of Deeds 398, page 81?

Mr. ALEXANDER: Yes.

Received and marked "Claimant's Exhibit A."

Following is the description:

"All that tract or parcel of land situate in the Town of Hurley, County of Ulster and State of New York, lying on the south side of the public road (formerly the plank road) and on the southeast

side of the road leading from the public road aforesaid to
26 Jacob R. Markle, it being the end of two lots, the one formerly owned by Cornelius Eckert, and the other known as the Elting lot, and butted and bounded as follows: Beginning at the public road aforesaid, from thence running southeasterly along the other lands of the parties of the first part conveyed to him by John D. Osborne to a stake and stones about twenty-three chains more or less to lands formerly Isaac Boil, now the party of the first part, thence southwesterly along said mentioned lot to a stake and stones until it strikes the Eckert lot aforesaid, from thence about two chains and twenty links to a stake and stones in the line of one Veiley, from thence in a southwesterly direction about seven chains and a half to a stone heap on the bounds of said Veiley to a lot bought of Samuel North in the possession of Seaman, from thence in a northwest direction with a straight line to the school house and to the Markle road aforesaid, from thence along said road to the place of beginning, containing about twenty-five acres of land more or less.

"Second. Also another piece or parcel of land situate in the Town of Hurley aforesaid and butted and bounded as follows: On the north by lands formerly owned by Gilbert Gillett or his heirs, on south by lands conveyed by John D. Osborne to Truman K. Smith, on the west by land conveyed by Addison S. Stratton to the party of the first part, and lands formerly owned by Isaac Boil, on the east by land conveyed to Richard Lewis by Cornelius T. Jones and wife containing twenty-eight acres of land more or less. Excepting and reserving therefrom three and nine-tenths acres of land heretofore sold to George C. Bennett.

27 "Third. Also another piece or parcel of land situate, lying and being in the Town of Hurley aforesaid known and distinguished as part of the northwest end of the south half of the south quarter of the south half in the sub-division in Great Lot No. 4, in the first allotment of the Hurley Patentee Woods of Hurley and is described as follows: Commencing on the north corner of said lot in the line of said Warren and runs from thence a southeasterly course to a chestnut tree standing on the original at the foot of the ledge in the westerly side of the rock oak hill, thence across said lot to a hemlock stump with a stake and stones on the southwesterly side of said lot, thence along the original line a northwesterly course to the westerly corner of said lot, thence along the line of lands of said Warren to the place of beginning, containing about twelve acres of land more or less.

"Fourth. Also another small lot of land situate, lying and being in the Town of Hurley aforesaid in lot No. 4 in the first allotment of the patentee Woods subdivided and is part of lot No. 6 in said subdivision on the south side of the public road (formerly the plank road) and is bounded on the north by said public road, on the west and south by the other lands of said Warren, containing about one acre of land more or less."

Consideration stated \$1 and other value.

Mr. LINSON In this deed I call attention to the covenant against incumbrances: "That the said premises are free from incumbrances, except a mortgage made by Franklin O. Van Velsen and wife to the Home Seekers' Co-operative Savings and Loan Association, on which not over \$350 remains unpaid and subject to which this property is sold."

Mr. ALEXANDER: I will also concede that that mortgage has not been paid.

28 I offer in evidence a bond and mortgage from Herman Aaron to Jacob Hogan for the sum of \$490, and also a satisfaction of the said mortgage; the date of the mortgage is the 12th of September, 1906, and the satisfaction piece is dated the 8th of April, 1907.

Received and marked respectively "Claimants' Exhibits B, C and D."

Mr. ALEXANDER: I offer in evidence, and will submit during the afternoon, a certified copy of a deed from the same party, Herman Aaron and Satie, his wife, to James P. McGovern, dated September 15, 1906, acknowledged September 15, 1906, recorded October 10, 1906, in Liber 398, page 162, consideration being stated as "One dollar and other value."

Received, and upon being furnished later in the day, was marked "Claimant's Exhibit E."

Following is the description:

"All that tract or parcel of land, situate in the Town of Hurley, County of Ulster and State of New York, lying on the south side of the Public road (formerly the Plank Road) and on the southeast side of the road leading from the Public Road aforesaid, to Jacob R. Markle, it being the end of two lots, the one formerly owned by Cornelius Eckert, and the other known as the Elting lot, and butted and bounded as follows:

"Beginning at the Public Road aforesaid, from thence running southeasterly along the other lands of the parties of the first part conveyed to him by John D. Osborne to a stake and stones about twenty-three chains more or less to lands of formerly Isaac Boil, and later Franklin O. Van Velsen, thence southwesterly along

29 said mentioned lot to a stake and stones until it strikes the Eckert lot, aforesaid, from thence about two chains and twenty links to a stake and stones in the line of one Veiley, from thence in a southwesterly direction about seven chains and a half to a stone heap on the bounds of said Veiley to a lot bought of Samuel North in the possession of Seaman, from thence in a north-west direction with a straight line to the school house and to the Markle Road aforesaid, from thence along said road to the place of beginning. Containing about twenty-five acres more or less.

"Second. Also another piece or parcel of land, situate in the Town of Hurley, aforesaid, and butted and bounded as follows: On the north by lands formerly owned by Gilbert Gillett or his heirs, on the south by lands conveyed by John D. Osborne to Truman K. Smith, on the west by land conveyed by Addison S. Stratton to Franklin O. Van Velson, and lands formerly owned by Isaac Boil,

on the east by land conveyed to Richard Lewis by Cornelius T. Jones and wife, containing twenty-eight acres of land more or less. Excepting and reserving therefrom three and nine-tenths acres of land heretofore sold to George C. Bennett.

"Third. Also another piece or parcel of land, situate, lying and being in the Town of Hurley aforesaid, known and distinguished as part of the northwest end of the south half of the south quarter of the south half in the subdivision of Great Lot No. 4, in the first allotment of the Hurley Patentee Woods of Hurley, and is described as follows: Commencing on the north corner of said lot in the line of said Warren and runs from thence a southeasterly course to a chestnut tree standing on the original at the foot of the ledge on the westerly side of the rock oak hill, thence across said
30 lot to a hemlock stump with a stake and stones on the south-westerly side of said lot, thence along the original line a north-westerly course to the westerly corner of said lot, thence along the line of lands of said Warren to the place of beginning. Containing about twelve acres of land more or less.

"Fourth. Also another small lot of land situate, lying and being in the Town of Hurley aforesaid, in Lot No. 4, in the first allotment of the Patentee Woods, subdivided and is part of Lot No. 6 in said subdivision on the south side of the Public Road (formerly the Plank Road) and is bounded on the north by said Public Road, on the west and south by the other lands of said Warren. Containing about one acre of land more or less."

Consideration stated, \$1 and other value.

Mr. LINSON: There seems to be a judgment of foreclosure or something of that sort on that property, entered in December, 1902. I have sent for the young man who made the search in this case and we will take that up later.

Mr. ALEXANDER: I offer in evidence a blue-print, purporting to be a map showing the whole property, of which 246 is a part.

Received and marked "Claimant's Exhibit F."

FRANK BURHANS, sworn for claimant, testified.

Examined by Mr. ALEXANDER:

Q. Mr. Burhans, prior to the 22nd day of July, 1907, were you, as representing Mr. McGovern, in possession of this property?

A. I was.

31 Q. You were continuously in possession of the property for and on behalf of Mr. McGovern, the owner?

A. Yes.

Q. And do you know whether the said parcel is free from incumbrances except a mortgage made by Franklin O. Van Velsen and wife to the Home Seekers' Co-operative Savings and Loan Association?

A. That is the only mortgage.

Q. Are there any leases of any kind on the property?

A. None.

Q. Are there any other incumbrances of any kind against the property?

A. None except what is stated.

Q. Will you give us the exact amount due on the mortgage from Van Velsen to the Home Seekers' Association?

A. \$296.54, the 1st of the month.

Q. The 1st of which month, this last month?

A. This month.

Q. The 1st of November, 1907?

A. Yes.

Mr. ALEXANDER: I want to state that I had subpoenaed the engineer, J. Waldo Smith, to present the principal value of this property, what I claim to be its principal value, its value as a part of a reservoir site, but since Mr. Smith is not here, I will go on with what I consider to be the least element of value of the property the farming part of it, and when the engineer comes I ask permission to put him on the stand.

The CHAIRMAN: Yes.

CHARLES O. VOGT, sworn for claimant, testified:

Examined By Mr. ALEXANDER:

Q. Mr. Vogt, you have testified as an expert before various of the commissions in condemnation proceedings here?

A. Yes, sir.

32 Q. And have you had any experience in valuing farm lands in the immediate vicinity of the Ashokan reservoir district?

A. In Ulster County.

Q. What experience have you had, will you please state to the Commission?

A. I have been in the real estate business and I have sold farms in various parts of the county, and property in the City of Kingston and otherwise.

Q. Have you appraised the value of farms in Ulster County?

A. Yes.

Q. And are you familiar with the productivity of the soil?

A. Yes, sir.

Q. And with farming to a certain extent?

A. Yes, sir.

Q. And agriculture?

A. Yes, sir.

Q. Can you state a little more extensively just what experience you have had?

A. Well, at the time I was in Esopus I farmed variously for several years on a farm that is near the depot, at the Port Ewen depot at Esopus. I also had quite considerable experience on a farm—I didn't do the active work, but I oversaw the cultivation—in the Town of Esopus, near South Rondout, and on one or two other occasions.

Q. Have you bought and sold sand?

A. Yes, sir.

Q. As you found it?

A. Yes, sir, I have; I bought and sold sand for about three or four years.

Q. Have you had any experience in raising trees of any kind, such as apple trees and ornamental trees?

A. Yes, sir, quite extensively.

Q. And buying and selling them?

A. Yes.

Q. Did you on October 15, 1907, inspect the premises known as parcel No. 246, now owned by the City of New York, and formerly owned by James P. McGovern and which, prior to the time of his ownership, was known as the Jacob Hogan property?

A. Did you say October 15th?

Q. Yes, October 15th.

A. Yes, it was October 15th.

Q. Will you please describe in your own way to the Commission the character of that property?

33 A. The farm is situated, well, I should call it on the road leading from Olive Branch Station to West Hurley, but it also borders part of the way on a road that leads to Brown's Station, or Stone Church; I should say there was about 600 feet of the farm on the road that turns towards Brown's Station and about 400 feet on the road that turns toward West Hurley; it comes in a corner there; I should say it was about a half a mile from Olive Branch Station—do you want me to describe the farm now?

Q. Please describe the farm?

A. Well, I went over to the farm. I should say there were about 20 acres of hay land on the farm and about 15 acres of pasture land, part of this hay land is tillable land, and in fact most all of it is tillable land. There was particularly, I noticed, on one of the back lots—there was a back lot of about four acres that had corn stubble on it, which conclusively showed there had been corn on the lot about two years previous to that.

(Com. NICOLL:)

Q. How many acres?

A. About four acres of back lot, and there were 15 acres of pasture land and 25 acres and four hundred and sixty-nine thousandths of an acre of young timber land. Now that is all in the intake, but as that map you see there shows outside of the intake there is 4.653 acres of young timber, wood land, which I have taken into consideration.

(The CHAIRMAN:)

Q. That is all young timber land, is it?

A. All young timber land; that is, there are a number of fruit trees, apple trees. Do you want me to state the number of them?

Q. Yes, you can state the number?

A. There are 47 I consider as first class apple trees and 21 second class.

Q. What do you mean by first class apple trees and second class apple trees?

A. I mean trees that are in good condition, thrifty condition and in good bearing condition; and a second class tree is one that shows neglect or otherwise. There are three plum trees and one
 34 Tamarack ornamental tree near the front of the house; one peach tree; there is a large elm shade tree near the front of the house along the highway; also one ash tree in front of the house; one large chestnut tree along the highway near the barn, and also a large maple shade tree along the highway near the barn.

Q. Did you place any valuation upon these trees?

A. I did, yes, sir.

Q. To what extent would those trees enhance the value of the land in your opinion?

A. The whole number of trees?

Q. The whole number?

A. The shade and ornamental trees \$1,844.

(The CHAIRMAN:)

Q. The shade and ornamental trees?

A. The shade, ornamental and fruit trees.

(Com. NICOLL:)

Q. How much?

A. \$1,844.

Q. Can you state separately how much the 47 first class apple trees each enhanced the value of the land?

A. I have estimated \$30 a tree.

Mr. ALEXANDER: Is there any objection to putting this statement in, to save time?

Mr. LINSON: How much of it do you offer?

Mr. ALEXANDER: I offer so much of it as relates to what the witness states each class of tree enhances the value of the land, that is "47 first class apple trees at \$30, \$1,410.00. 21 second class apple trees and young trees at \$15 each, \$315.00," etc.

Received and marked "Claimant's Exhibit G."

Following is a copy of the same:

"47 1st class apple trees at \$30.....	\$1,410.00
21 2nd class apple trees and young trees at \$15.....	315.00
3 plum trees at \$3.....	9.00
1 tamarack ornament tree	20.00
1 peach tree	10.00
35 1 large elm shade tree in front of house	25.00
1 ash tree in front of house	5.00
1 large chestnut tree along road near barn	25.00
1 large maple along road near barn	25.00

Fruit and shade trees \$1,844.00

Q. What is the general character of the soil on this property?

A. Well, the back lots are gravelly and stony soil mixed with

some clay, very slight though, and the character of the other hay land is similar.

Q. How many acres of the stony soil are there, or gravelly soil?

A. Well, there are, according to that, hay land twenty acres.

Q. Twenty acres out of the sixty?

A. Yes, it isn't large stone; it is small stone, what you would consider as gravelly; some stone, possibly here and there an odd boulder.

Q. What, in your opinion, are the most advantageous uses to which this soil which you have described as stony and gravelly could be put?

A. Well, to other general farm crops, grain, etc.

Q. What is the general character of the soil on the balance of the property?

A. Well, you might call it mountain soil. That is, you mean the pasture land? The pasture land is rocky pasture land; some of it is black dirt.

Q. Is it good pasture land as pasture land goes?

A. Yes, I consider it fairly good pasture land; I have seen better and I have seen considerably worse.

Q. Could the farm in its present condition be operated as a farm successfully and profitably in your opinion?

A. Oh, yes.

Q. Without treating it in any way?

A. What do you mean by treating it?

Q. Without treating it, liming it or treating it?

A. Oh, yes, you could get a fair amount of success.

36 Q. Without fertilizing it?

A. Without any absolute necessity of fertilizing; of course, it would be better if it had some fertilizer on it.

Q. Were there any structures upon this property?

A. There is a house and barn and there is a building that has been used part as a hog house and otherwise; there is an outside summer kitchen, or outside kitchen, a smoke house, toilet and a chicken house.

Q. Will you describe to the Commission the character of the house?

A. The house is pretty fair.

Q. What are the dimensions of it?

A. The house is 18 x 22, that is the main building is 18 x 22, with 14 foot posts, with an addition on the rear 12 x 14-6; seven foot posts; also an addition on the side 16 x 21, nine foot posts. There is a good cellar under the house; there are seven rooms; and the condition is pretty good. The hog pen—do you want that?

Q. Yes, go ahead and describe the buildings?

A. The hog pen is 12-6 x 14-6, with eight foot posts, in good condition. There is also an outside kitchen, an outside summer kitchen and smoke house with a toilet and a chicken house. The chicken house is comparatively new, nearly new floor, with windows, doors, etc. That chicken house is seven by 12. The barn is 26 x 36 with

16 foot posts and a basement underneath; it has apparently been used as a wagon house and cow barn.

(Com. NICOLL:)

Q. Any floor?

A. No.

Q. What is the floor, a cement floor or dirt floor?

A. A dirt floor.

Q. What is the character of the buildings you have described?

Are they in good condition?

A. Well, the house was in pretty good condition; the barn was in good condition except possibly the siding was somewhat worn, and the roof, one side of the roof; otherwise the barn was in good condition.

Mr. ALEXANDER: I understand that this Commission has ruled out all evidence of structural value?

37 The CHAIRMAN: Yes, where it has been presented to us, except in one case. In one case, we thought that evidence of structural value was competent, that is, the case of a school house that had been removed and set up in another place. I think, under the decisions. Mr. Alexander, that structural value in this case is not competent.

Q. Can you state whether the buildings that you found on this property are suitable to the property and suitable to the locality?

A. Oh, yes.

Q. And are they the ordinary type of buildings found in that section of the country?

Mr. LINSON: I object to that as calling for an opinion, and that there is no foundation for the evidence.

The CHAIRMAN: I think I will take that.

Mr. LINSON: Exception.

A. Yes, I think they are very appropriate for that place.

Q. They are the ordinary type of farm buildings found right throughout the section, are they not?

A. Yes, they are the usual buildings.

Q. Now, in your opinion, how much does the house enhance the value of the land?

A. \$800.

(The CHAIRMAN:)

Q. How much?

A. \$800.

Q. And the hog house?

A. \$75.

Q. The outside kitchen?

A. \$15.

Q. Smoke house?

A. \$10.

Q. The toilet?

A. \$10.

Q. The chicken house?

A. \$50.

Q. You have mentioned the shade, ornamental and fruit trees as \$1,844, have you not?

A. Yes.

Q. Now, in your opinion, what are the 20 acres of hay land worth for agricultural purposes?

Mr. LINSON: To that I object upon the ground it is improper and calls for an improper measure of damages.

38 The CHAIRMAN: I do not think it is the proper measure of damages.

Mr. ALEXANDER: I except.

Q. Have you had any experience in buying or selling any property which was part of a reservoir site?

Mr. LINSON: That I object to as immaterial.

The CHAIRMAN: I will allow him to state whether he has had any experience or not.

A. I never had any experience.

Q. You don't know the value of a piece of property that is being used for farm purposes, but which is a part of a reservoir site, do you?

A. No.

Q. In all of the testimony that you have given you have not testified to the value of this property, No. 246, considering it to be a part of a natural reservoir site, have you?

A. I have not considered it as a reservoir site.

Q. Because you don't understand that element of value?

A. I do not.

Q. Now taking into consideration everything that you know about property what, in your opinion, would be the fair and reasonable market value of this property in the condition in which you found it, excluding any element of reservoir site value?

Mr. LINSON: Objected to as improper in form and being an improper measure of damages.

The CHAIRMAN: The fair market value is what he asks, I suppose from the condition in which it was when he saw it; to that extent I will allow him to testify; he has no knowledge of any other value, except the farm value, he says.

Q. What is the fair and reasonable agricultural value of this property?

Mr. LINSON: Objected to as improper and calling for an improper measure of damages.

39 The CHAIRMAN: Exclude the word "agricultural;" what is the fair market value?

Mr. ALEXANDER: That I cannot ask because he don't know. I have authorities here upon that point.

The CHAIRMAN: Until you submit the authorities I will exclude it, as long as you retain the word "agricultural" in it.

Mr. ALEXANDER: Then I ask your Honors to allow me to submit the authorities.

The CHAIRMAN: Yes.

Mr. LINSON: Before that is taken up I would like to get this title straightened out. I offer in evidence the record of a notice of pendency of action in favor of George Pierson against Franklin O. Van Velsen and Mary L. Van Velsen, filed in the office of the Clerk of Ulster County on the 10th day of June, 1902, in an action to foreclose a mortgage covering the premises in question, and also a judgment of foreclosure and sale in the same action entered on the 15th of December, 1902, in the same office, recorded in judgment book No. 28, at page 612.

The CHAIRMAN: Is that the date of the judgment or is that the date of the filing of the *lis pendens*?

Mr. LINSON: That is the date of the judgment. Now I offer in evidence a record of the mortgage on which that foreclosure was had, being a mortgage from Franklin O. Van Velsen and Mary, his wife, to George Pierson, dated January 18, 1900, recorded January 22, 1900, in book of Mortgages 250, at page 13. Consideration \$325. Also the record of a satisfaction of said mortgage, dated January 23, 1903, recorded April 28, 1903, in Mortgage book 203, page 476.

That is to say, the situation is this, that there was a mortgage on these premises which has been satisfied of record, and there is also a notice of *lis pendens* and a judgment of foreclosure of the same mortgage which has not been satisfied of record nor had any sale ever been had so far as I can discover.

The CHAIRMAN: The mortgage has been paid on which the judgment was due?

Mr. LINSON: Probably; I submit it for the purpose of the Commission to pass upon.

Recess to 2 P. M.

Afternoon Session.

CHARLES O. VOGT, recalled:

Examined by Mr. ALEXANDER:

The CHAIRMAN: I think the evidence as proposed by the two last questions by Mr. Alexander is competent. The first is what in his judgment is the fair value of this property excluding any valuation for reservoir purposes, and the second, what is its fair value for agricultural purposes? I think I will allow him to ask them.

Mr. LINSON: The question as to its value excluding its value for reservoir purposes, I would think that might be competent, but I think all the authorities are that there can be no evidence given of any particular value; its value may be given for any purposes, but not for any specific purpose.

The CHAIRMAN: I will allow him to give his opinion as to the

value of this property, excluding its value for reservoir purposes, and also its value for agricultural purposes.

41 Q. Mr. Vogt, will you take up these questions separately and first tell me the fair and reasonable market value of this property for agricultural purpose in your opinion?

Mr. LINSON: Objected to upon the ground it is improper and incompetent and not a proper measure of damages; that evidence cannot be given of the value of the property for any specific purpose.

The CHAIRMAN: I will allow that question.

Petitioner excepted.

A. You want these values as I have made them here?

(The CHAIRMAN:)

Q. The total value for agricultural purposes of this farm; that is what he asks for?

A. \$7,110.10.

(The CHAIRMAN:)

Q. 10 cents?

A. Yes, sir.

Q. Does that exclude the four and some odd acres that were taken out or does it include them?

A. That includes the whole thing.

Q. That is the whole farm?

A. Yes.

Q. What would be the fair and reasonable value for agricultural purposes of the four acres that are excluded, the four and some odd acres?

Same objection. Same ruling.

Mr. LINSON: I except.

A. \$7,010.10.

Q. I ask you for the fair and reasonable market value for agricultural purposes of the four and some odd acres, 4.653?

Mr. LINSON: I object to it specifically upon the ground that it is not the proper measure of damages, the value of the remainder.

The CHAIRMAN: The idea of Mr. Alexander, as I suppose, is to deduct that value from the other value. He has the present situation; I think I will allow it.

Petitioner excepted.

42 A. \$232.65.

Q. What would you consider the 4.653 acres worth standing alone?

A. I wouldn't consider them standing alone as being worth any more than \$100. By "agricultural" do you mean—I put this in as young timber land; that is not applicable to grain and other purposes.

(Com. NICOLL:)

Q. That means the whole as a farm as it stands.

A. Just that four acres?

Q. What in your opinion would be the fair and reasonable market value for agricultural purposes of the 60.459 acres known as parcel 246?

A. Including this woodland?

(The CHAIRMAN:)

Q. Leaving out the four acres?

A. \$6,877.45.

Q. Now in your opinion, what is the most advantageous use to which this property could be put from your knowledge for any purpose?

Mr. LINSON: Objected to upon the ground that it is improper and leading.

The CHAIRMAN: I do not think that is proper.

Mr. ALEXANDER: I will withdraw that question.

Cross-examination by Mr. LINSON:

Q. In what town is this farm situated?

A. I believe it is in the town of West Hurley.

Q. The town of West Hurley?

A. The town of West Hurley.

Q. There is such a town as that in Ulster County, is there?

A. It is the town of Hurley, whatever you call it; it is called West Hurley.

Q. Well, what town now do you think it is in?

A. I think it is in the town of Hurley.

Q. Did you ever buy or sell real estate in the town of Hurley?

A. No, sir.

Q. Did you ever have anything to do with the purchase or sale of any real estate in the town of Hurley?

A. No, sir. I did not.

43 Q. Did you ever buy or sell any real estate in any town adjoining the town of Hurley?

A. No.

Q. Did you ever have anything to do with the purchase or sale of any real estate in any town adjoining the town of Hurley?

A. Well, I am not so sure whether the town of Ulster adjoins the town of Hurley or not; if it does I did.

Q. The town of Ulster does adjoin the town of Hurley. Did you ever have anything to do with the purchase or sale of any real estate in any town than the town of Ulster, which adjoins the town of Hurley?

A. No, sir.

Q. With how many parcels of real estate situated in the town of Ulster have you ever had anything to do with the purchase or sale?

A. Two, I believe; one or two; two I think; one wasn't consummated, if you would consider that a sale.

Q. Two, one of which was not consummated?

A. Yes, sir.

Q. Then you have had to do with one, haven't you?

A. Yes, sir.

Q. When was that?

A. Oh, about a year ago, I think.

Q. Where was the property situated?

A. Near Ulster Landing.

Q. Was it a brickyard property?

A. Yes, sir, that is what is was considered for.

Q. It lay along the river?

A. Yes, sir.

Q. Blue clay under it?

A. Yes, sir.

Q. Sand on top?

A. No, not very much, very little.

Q. Now being used as a brickyard?

A. Yes, sir, part of it is.

Q. Sold for brickyard purposes?

A. Yes, sir.

Q. And sold through your agency?

A. No, sir, it was not; I was negotiating through another party; not through my agency.

44 Q. Whom did you represent, the purchaser or the seller?

A. Well I represented the purchaser, practically speaking.

Q. Then all the property with which you ever had anything to do with the purchase or sale in any town adjoining the town of Hurley was one piece of brickyard property along the river, in which you represented the purchaser in the deal?

A. Yes, sir.

Q. And that deal was consummated, was it?

A. Well, it was and it was not; after a while, after they had negotiated and went over it—it is still in the course of adjustment at the present time.

Q. Then you never had anything to do with the actual sale or purchase of property in any town adjoining the town of Hurley?

A. No, sir, not in no actual sale that has been fully consummated.

Q. Or in any town adjoining the town of Ulster?

A. No, sir.

Q. In what towns in the county of Ulster have you had anything to do with the purchase or sale of any property?

A. In Esopus I have.

Q. The town of Esopus lies where with respect to the City of Kingston?

A. It lies across the creek.

Q. Across what creek?

A. The Rondout Creek, and it extends about six miles south and ten miles broad from the river.

Q. How far from Olive Branch?

A. About 14 miles; no, let me see; about 12, I should judge.

Q. Have you ever bought or sold any real estate in any town in the county other than in the town of Esopus?

A. Yes, sir.

Q. What towns?

A. In the City of Kingston, if you call that a town.

Q. I do not. I am not talking about city property; I am talking about the country property.

A. No, sir.

Q. You never had anything to do with the purchase or sale of any real estate in any town in the County of Ulster except the town of Esopus?

A. No, I can't say that I had absolutely.

45 Q. How many properties in the town of Esopus did you ever buy?

A. Well, that is a hard question.

Q. For yourself, I mean.

A. Three or four or five, I think, something like that.

Q. How many did you ever sell?

A. That I couldn't tell, I can't say; I don't know exactly, but I have had more than ten.

Q. You have sold more than ten?

A. Yes, sir, I think unquestionably, recently.

Q. You mean of which you were the owner?

A. No, sir, not of which I was the owner.

Q. Then in your answers to me concerning your dealings in real estate in the town of Esopus you have had in mind and include properties which you handled as a real estate broker?

A. Yes, sir.

Q. And you have handled in all about how many?

A. That I couldn't tell you exactly.

Q. What was the last one that you handled?

A. I think it was known as the Streeter farm, or the Lowe farm.

Q. Where was it located?

A. It is located in Esopus along the mountains west of the railroad, about a mile and a half from Ulster Park.

Q. Was that a sale or a trade?

A. That was a sale.

Q. By whom was it sold?

A. By Mr. Charles M. Streeter, I think his name was.

Q. To whom was it sold?

A. To a man by the name of Herr.

Q. Where was he from?

A. He was from Brooklyn, or somewhere down on Long Island.

Q. How long ago was that transaction?

A. I think it is less than a month.

Q. That property is about 20 miles from Olive Branch, isn't it, at least?

A. About 15 or 16, I should judge; taking Olive Branch about 11 miles from Kingston and that five miles from Kingston or from the passenger depot, that would make it about 16 miles.

Q. Olive Branch is 11 miles from what part of Kingston?

A. I am estimating it from the Union depot; I may be mistaken about that.

46 Q. It is about a mile from there to the creek, isn't it?

A. Well, but you take the West Shore Railroad, right down there from the railroad it is 16 miles and that farm lays adjoining the railroad.

Q. How many acres were there?

A. I think there was 79, if I am not mistaken.

Q. What kind of buildings were there on it?

A. Well, the farm house was an old fashioned stone house, very old fashioned, and in very bad condition; it laid right close under the mountain.

Q. What other buildings were there?

A. There was a barn, wagon house and a sort of hay house and other small buildings; I don't exactly know what they were.

Q. You negotiated the sale, did you?

A. I did.

Q. What did it bring?

Mr. ALEXANDER: I object to that as incompetent.

The CHAIRMAN: I don't think it is competent; how is it so, Mr. Linson?

Mr. LINSON: I am cross-examining an expert upon farm values in Ulster County; if the evidence is not material then he is not qualified to speak, because this is where he gets his knowledge.

The CHAIRMAN: He known this farm and he has dealt in real estate; that is what qualifies him to speak; I do not think it will do any harm to admit it.

Mr. ALEXANDER: I object to it on the ground that the two farms may be entirely different and it is a collateral issue—I will withdraw the objection.

(Question repeated.)

A. \$5,500.

Q. And it contained how many acres?

A. I think it was 79 acres; I ain't exactly positive as to that.

Q. The sale was how long ago?

A. Less than a month ago.

47 Q. What was the last property with which you had to deal before that, the last farm?

A. Well, that same day I sold another property in the town of Esopus.

Q. What property was that?

A. The owner at that time was William Ellsworth.

Q. Where was it located?

A. It was located about a mile and a half south of the ferry on the highway.

Q. On what road?

A. On the road that leads from Ulster Park to Kingston or Rondout.

Q. The river road or the other road?

A. The other road.

Q. Who was that sold to?

A. A man in Kingston here by the name of Stewart, or his wife.

Q. How many acres are there in that?

A. 74.

Q. I don't know as I know where that property lies?

A. Do you know where Jim Van Aken lives?

Q. Yes.

A. It is this side of there across the road; that stone house with a part frame addition.

Q. That is the old Terpenning farm?

A. Yes; William Ellsworth was a son-in-law or a grandson of Terpenning, and he bought it in at the sale.

Q. What did he give for it?

A. \$6,000.

Q. To whom did he sell it?

A. A man by the name of Stewart, or Mrs. Stewart.

Q. How long did he own it?

A. It had been in the estate I believe 50 years, she said.

Q. I mean this man.

A. Less than a year.

Q. What did he give for it?

A. That I don't know.

Q. Well, now, the one before that?

A. Well, I sold the Stephan property, for instance, in South Rondout.

Q. What property is that?

A. Stephan property at South Rondout.

Q. Is that a farm property?

A. A portion of it, yes; there is sand on it.

Q. It is a property that was sold primarily for brickyard purposes?

A. I don't think there is a brickyard there, but primarily for the sand; that was the principal value of it.

Q. And not the agricultural value?

A. It had an agricultural value.

Q. That wasn't its most important item, was it, the agricultural value?

A. No, not at all.

Q. Now get back to another farm, the last one before that?

A. Another one before that?

Q. Yes.

A. Well, I sold a farm known as the Jacob Shultz farm.

Q. Where was that?

A. In the town of Esopus.

Q. What part?

A. Right up under the mountain, back off the main road about mile, not quite a mile off the main road on the way from Portland Eddyville, on the way to New Salem.

Q. How far from the station?

A. About a mile and a half.

Q. In which direction?

A. West about a mile and then go about a half a mile south.

Q. What was the size of that farm?

A. Including the woodland—it was mostly woodland—it was 95 acres.

Q. What buildings did it have on it?

A. It had a little bit of a three-room shack on it and what was called a barn, the partial remains of a barn.

Q. When was that sold?

A. Two or three weeks ago; I am not positive of that, it was within a month.

Q. Who bought it?

A. A man by the name of Stone.

Q. Where does he live?

A. Well, he is supposed to be the lightning calculator of Barnum's Circus; I guess he lives all over the United States; I don't know where his home is.

Q. What did he give for that place?

A. \$2,850.

Q. For how many acres?

A. Well, denuded of woodland—it is 95 acres all told, everything.

Q. Give me one more; what is the last one before that?

A. These are not in rotation; I have sold these all within this time, but I don't know whether they come one right after the other; I sold a farm right next to that, adjoining that.

49 Q. When was that?

A. Some time, I think, in March.

Q. Who owned it?

A. Wendell Shearer.

Q. Who bought it?

A. A man by the name of Rohr.

Q. Where was he from?

A. Near 34th street, New York City.

Q. How many acres were there in it?

A. Something about 50.

Q. What kind of buildings were there on it?

A. The house was an old-fashioned house with an addition to it, and the barn was an old barn, well, probably 50 or 60 years old; there was a small granary and some other small outbuildings, chicken coop, etc.

Q. How much did you get out of the New York fellow for that?

A. \$5,000.

Q. Cash?

A. No, sir; he paid \$3,000 cash, if I am not mistaken, and \$2,000 by mortgage.

Q. How long have you been in the real estate business?

A. Oh, I have been selling real estate off and on probably four or five years.

Q. How long have you followed it as an occupation?

A. That is, my principal occupation?

Q. Yes.

A. I should say about a year, one year or one year and a half.

Q. What were you doing before that as your principal occupation?

A. I was in the coal business.

Q. Where?

A. At Port Ewen Station.

Q. How long were you there in the coal business?

A. I was also the railroad agent there at the same time; I was there about 10 years.

Q. What was your business before you went into the coal business?

A. I also conducted farming operations there at that time; I had a small place adjoining.

Q. When you had the coal business at Port Ewen Station you also ran a farm?

A. Well, yes.

Q. How large a farm?

A. Five acres there and then I ran a portion of another; I should say about 15 or 16 acres all together.

50 Q. During the ten years?

A. Yes, sir.

Q. What was your business before that time?

A. I have been in the grocery business, ran a country grocery store for a number of years.

Q. Where did you carry on the grocery business?

A. In South Rondout.

Q. How long were you there?

A. Well, I should say five or six years.

Q. Have you ever been in any other business?

A. Yes, sir.

Q. What?

A. I was a mechanic.

Q. What is your trade?

A. Well, ship carpenter and joiner.

Q. How long did you work at that?

A. Well, I should judge about four years.

Q. In the yards at South Rondout?

A. Yes, sir; and I also had charge of a gang of men in New York City; house work.

Q. Well, have you been in any other business?

A. I don't think I have; I think that pretty nearly covers it. I have done speculating occasionally.

Q. How did you arrive at your figures of \$6,877.45 as being the market value of this land?

A. Well, I considered the value of the trees and the value of the farm and then considered it as other farms there similarly located, for this purpose, and arrived at it in that way, in a general way, a general consideration of the matter.

Q. Let me see if I understand that answer; you considered the value of the trees—was that the first thing you took into consideration?

A. I don't know as I did at that time. I looked over the farm generally, from one thing to another, and went on and valued it.

Q. Did you value it as a whole first, or did you value it in parts first?

A. No, sir, I did not, because I couldn't see over the whole of it; I couldn't value the whole first; I didn't know what it consisted of.

51 Q. Couldn't you have gone over the whole of it before you placed a valuation of it?

A. I suppose that could have been done, yes, sir.

Q. But you didn't do it?

A. I went over the place, yes, I did, and then I considered the value separately.

Q. The value of certain portions of it separately?

A. Yes, I did.

Q. Now I want to get at the operation you went through in doing that; tell me just how you arrived at it before you made your final figures of that valuation?

A. I think we walked over the property entirely.

Q. That isn't what I mean; I want to get at your items by which you made up that amount, if there was some way or some manner in which you did it, before you made your entire valuation?

A. I considered the value of the house.

Q. The first thing?

A. I think that was the first article I considered.

Q. What do you mean by the value of the house?

A. I mean the physical value of the house as it stands there for the use of that farm.

Q. You don't mean its structural value, do you?

A. No, I do not; the structural value would have been more than I have given.

Q. You have given us those items, have you?

A. Yes.

Q. What was the aggregate of the items of the buildings which you took in that way to make up a part of the value of the farm?

A. \$1,760.

Q. And you think those were the first things you took into consideration and the first things that you figured on?

A. I think they were.

Q. Now what was the next?

A. I think at the same time, while we were doing that, we also took the ornamental and shade trees there in front of the house.

Q. You have a paper there which I haven't seen, giving the value that you placed upon the trees?

A. Yes; you have it there.

52 Q. Now will you tell me what you mean by these values?

A. On the trees?

Q. Yes.

A. Well, I looked at those trees, which I have called first class apple trees, and I considered the probable life of the tree and the probable income of the tree, and I considered that \$30 was a very conservative estimate on a tree of that character, from its income, character, and general condition.

Q. Did you ever know of a farm being sold in that way?

A. No, I did not, but that is taken into consideration when—

Q. (Interrupting.) Wait; just answer my question; did you ever know of where a man was selling a farm or purchasing a farm of figuring up the value of a farm in that way?

A. I think I have, yes, sir. I think that Ellsworth farm, that materially was taken into consideration, the value of that apple orchard.

Q. I haven't any doubt about that, but I say did you ever know of its being figured up at so much a tree?

A. No, I don't know as I have.

Q. Then will you tell me where you get your figure of \$30 a tree for an apple tree?

A. Well, you know when I was station agent I had general supervision over that whole line of work there and also I came in direct contact with fruit, and I speculated almost every year in fruit.

Q. I don't ask where you got your information; that isn't what I am asking you; I am asking you for the operation by which you arrived at the figure of \$30 for an apple tree.

A. I was just trying to explain it.

Q. No, you were giving me where you got your information; I am asking you what the information is.

The CHAIRMAN: He wants to know how you arrive at that; not the source of your information, but how you yourself arrived at \$30 a tree.

53 A. I think I answered that plainly. I said from the general condition and the income from it, etc.

Q. Now give me the general condition and income from it; tell me how that figures up \$30.

A. Well, those apple trees were in a condition to bear from three to five barrels of apples every other year, and I, from my information and my experience, would say that the average value on that tree for the years past, for the last five years, would be about \$1.50 per tree, on the tree. Now the average is only three barrels, and I have known apple trees of not any better character than those that have borne seven barrels and more; and if the average had only been three barrels that would have been an income value of \$4.50. Being conservative with it and saying that the average would only be three barrels per tree, that would have been an income of 10 per cent. on the amount of \$30. Now if you take into consideration what the life of an apple tree is worth—the life of an apple tree is even more than 50 years—then that is a conservative estimate.

Q. And the same way with the young apple trees and the second class apple trees?

A. Yes, sir; I gauged them up as to their qualifications and appearance, and I arrived at my values by comparisons.

Q. Now what about the shade trees?

A. Well, there is not always an absolute rule, but if I had owned the property I would have considered the value of those shade trees enhanced the value of that property, and that is the amount of money that I put on them.

Q. Then you didn't go through any operation of reasoning by which you calculated any income on those?

A. A shade tree has no income.

Q. Answer the question, Mr. Vogt.

A. No, I did not.

Q. That was simply an arbitrary figure that you fixed from what you thought it would be worth if it was your property?

A. I don't think so; I think it was arrived at by comparison with other properties similarly situated, and as to why it would go to make up the value.

54 Q. Now, for instance, what other properties similarly situated?

A. Well, take town properties or any property.

Q. I don't want to take town property or any property; I want you to name the property.

A. Well, I took my own property, right at home.

Q. Have you ever had that valued by the tree?

A. No, but I have often considered that as a value; I have considered the cost of setting it out and the time it would take to grow it, etc. Of course, there is no absolute rule by which a man can say there is an arbitrary value to it.

Q. Did you do that in regard to these trees?

A. Yes, I think I did.

Q. Just give me those elements again that you say you took into consideration?

A. For instance, if I was a real estate agent——

Q. (Int'g.) Oh, no, no, Mr. Vogt.

The CHAIRMAN: I wouldn't spend much time on that, Mr. Linson. We all know that shade trees add to the value of residences wherever they may be. We also know, I think, that he cannot put any specific value on them.

Q. Then the total that you allowed for that was \$1,844, as I find by this paper?

A. Yes, sir.

(Mr. ALEXANDER:)

Q. Does that include all of the trees?

A. The shade, ornamental and fruit trees.

Q. How did you arrive at the remainder of the valuation of the place?

A. I considered 20 acres of hay land—most of that is tillable land also—at \$70 per acre.

Q. Being what?

A. \$1,400.

Q. Go on.

A. 15 acres of pasture land at \$40 per acre, \$600. 25.469 acres of young timber land at \$50 per acre.

Q. Making how much?

A. \$1,273.45.

Q. What do you mean by young timber land?

55 A. I mean the timber that has grown up. There is probably trees of the age of from one to five and ten and fifteen years' growth, and twenty years' growth on it.

Q. Is there any timber there that could be sold for sawmill purposes?

A. Oh, there is an odd tree.

Q. Here and there an odd tree?

A. Yes.

Q. Well, now isn't that largely brush land?

A. No, I don't think so; it is beyond the brush period.

Q. You wouldn't call any of it brush?

A. Well, I wouldn't say that none of it was, but the largest majority of this, in fact you might almost call it exclusively, or the majority of this is what I would say had a growth of about 10 to 12 years, and possibly 15.

Q. Now as I understand you there is only here and there a tree that would do for sawmill purposes?

A. Yes; that is right.

Q. Is there anything there that would answer for telephone poles or telegraph poles?

A. Not with the requirements that are required now.

Q. Is there anything that would answer for cord wood?

A. Yes, sir.

Q. Did you estimate about how much cord wood there was there?

A. No; I would have taken that matter in, but I had always——

Q. (Int'g.) Never mind what you would have done; did you?

A. No.

Q. Have you any idea how much cord wood it will run to an acre?

A. Yes, I think I am competent to say that.

Q. Now I would like your opinion?

A. Well, let us see.

Q. Did you take it into consideration in fixing this value, first?

A. Yes, I did. I am trying to get that thing over in my mind a little bit.

Q. All right, take your own time.

A. Well, about 15 to 20 cords per acre.

Q. 15 to 20 cords per acre; that is cord wood, is it?

A. That is cord wood.

Q. Not mere fire wood?

A. I failed to mention the fact that I have been quite deeply interested in that kind of business.

56 Q. Never mind about that. Is it what you would call cord wood in the wood business, or is it mere fire wood?

A. I say cord wood; I mean merchantable cord wood.

Q. What is that worth on the ground?

A. It is worth there not less than \$1.25 a cord at the present time.

Q. How many cords would you say there were on the 25 and a fraction acres?

A. Well, it might run up to 350 cords; from 250 to 350 cords.

Q. Would you say 325 cords?

A. Well, I would rather say it would run 350 cords.

Q. How much would that be at \$1.25 a cord?

A. Just a quarter times more than that.

Q. Just figure it so we can put it on the minutes.

A. \$427.50.

Q. Isn't it \$437.50?

A. \$437.50; that is right.

Q. How much would that leave for the land?

A. Well, I should judge about in the neighborhood of \$30 an acre.

Q. No, how much altogether? There isn't anything else on that land but the cord wood, is there?

A. Well, its present value, if you were to cut it down for its absolute value today——

Q. (Int'g.) The difference between that and the whole of your figures would be the value that you put on that land, wouldn't it?

A. I don't think so, because I think its value is greater as young growing timber.

Q. Its value is greater than it is worth now?

A. Yes; that is, its present marketable value; a man wouldn't——

Q. (Interrupting.) Wait; then you don't mean that \$437.50 is the present value of the wood upon that land?

A. Certainly not, no, sir. You asked me what it was worth as cord wood.

Q. What is it good for besides cord wood?

A. At present?

Q. Yes.

A. It is good as growing timber.

57 Q. Good now as growing timber?

A. Yes, it has a value to that effect.

Q. A value in addition to its value for cord wood?

A. Oh, surely.

Q. Could you use it for anything else except cord wood?

A. No, not at present.

Q. Then what you mean is that it has a prospective value?

A. Yes, I do. I think it has a value——

Q. (Interrupting.) Wait a minute; let me ask the questions and you answer them and you will have all you can do. Now \$437.50 is the value that you place upon that cord wood?

A. Yes.

Q. That is all it could be sold for now, isn't it?

A. No.

Q. For present use?

A. If you were to take it off that is all it could be used for.

Q. But you think it is worth more than that prospectively?

A. I think it is worth more than that today as a marketable value for anyone that wanted it.

(The CHAIRMAN:)

Q. What you mean is the farm is worth more because of it being there and growing than it would be to cut it off?

A. Surely; I made that explanation.

Q. How much more?

A. I think the value is in excess of the land at least \$20 per acre, and I think the land in my estimation is worth, if it was denuded of the timber, that the sprout land, after it had been cut off, is worth \$30 per acre.

Q. What I asked you, Mr. Vogt, was how much more than \$437.50 you thought that wood growing upon that land is now worth?

A. I think that figures out now \$509.38.

Q. By that do you mean that is in your judgment what that wood growing there adds to the land?

A. Yes, sir, I do.

Q. Which would be how much in excess of its value, as you fix it, for cord wood?

A. That would make \$84 difference according to that, if you value it that way.

58 Q. \$71.88 I make it.

A. \$509.38—you see there is 25.469 acres; you haven't added the fraction.

Q. I haven't taken the fraction at all; I have your valuation of the wood as cord wood \$437.50; that is correct, isn't it?

A. That is right; you are correct. I thought it was \$425; that is the difference.

Q. \$71.88 more for the purposes for which you have mentioned than as fire wood or cord wood?

A. Yes.

Q. And that leaves the valuation of the land, does it not, at \$864.02?

A. I think though to bind me absolutely down to the cord wood value, I don't think that is giving me a fair chance.

The CHAIRMAN: Don't argue it. Answer his questions. He wants to get the particulars. Counsel will argue it on both sides later.

The WITNESS: You are correct in your figures.

Q. \$864.02, which would be how much an acre for the wood land without the wood?

A. I figure it \$30 per acre.

Q. It would be something more than \$30; that is, that figure would make it more, wouldn't it?

A. No, I think not.

Q. Divide \$864.02 by 25 and a fraction?

A. You see that I figure it at \$50 an acre and the value denuded of the wood at \$30 an acre—maybe I misunderstood your question—therefore that would leave \$30 per acre for the bare land.

Q. Your figures, as I understand them, Mr. Vogt, are that the wood land valued as growing timber is worth \$509.38?

A. Yes, sir.

Q. And that the whole 25 and a fraction acres is worth \$1,273.45?

A. Yes.

Q. Then the difference between those figures would be the value of the land with the timber off, wouldn't it?

A. Yes.

Q. And that would be \$864.02, would it not?

A. If it figures that way, yes.

59 Q. Which would be how much an acre?

A. \$30 an acre.

Q. A little over \$30 an acre, wouldn't it?

A. No, sir; it is exactly \$30 an acre.

Q. Where did you get your figures of \$30 an acre for that land?

A. Well, I have got some growing timber land and I bought considerable.

Q. No, I am not asking you for your source of information, but how do you get at the figures of \$30 an acre?

A. The income value of it is worth that.

Q. Of that land considering the timber was taken off?

A. Yes, sir.

Q. Well, will it cost anything to clear it up?

A. You wouldn't have to clear it up. Let it go right back into timber again.

Q. Let it go right back into timber?

A. Yes, wood land again.

Q. And that would be your theory of the way of disposing of it?

A. Yes, sir, that would be my theory.

Q. And that is the way you get at your figures of \$30 an acre?

A. That is the way I arrive at my figures of \$30 an acre.

Q. That when the present timber was cut off, or the present wood was cut off, you would let it grow up to wood again?

A. That is the income value; yes, sir.

Q. That is what I am trying to get at, whether you figured it for agricultural purposes purely or for wood land?

A. I figured that as a wood lot and I have appraised it at that.

Q. And with the idea that it would be kept in wood land?

A. With the idea that it was kept in wood land principally?

Q. You think it is worth more for that than you do if the wood was cut off and it were put into pasture land or into meadow land?

A. It wouldn't be applicable to either one of those purposes.

Q. Why, is it too rocky?

A. Yes, it is rocky and hilly; is it good wood land.

60 Q. And the other part of the farm, how is that as to being rocky or hilly?

A. Well, now that which I have considered and called the \$70 land is reasonably decent land.

Q. When was it you were up there, Mr. Vogt?

A. The 15th day of October.

Q. Had you ever been upon it before?

A. Yes, I think once before that.

Q. How long ago?

A. Well, I don't know; probably a month before that; I am not certain of that.

Q. That was simply a casual visit at that time?

A. Yes, sir.

Q. You didn't take any account of it then?

A. No.

Q. Nor examine it very carefully with reference to its value?

A. No, I didn't go over it; I was just on the place; I drove on it for some purpose, I have forgotten what it was.

Q. How long were you upon it at this time when you did place a value on it?

A. Well, we were there the most part of the day.

Q. Who was with you?

A. Mr. Donihue.

Q. Of course, whatever hay there had been upon it had been cut, had it not?

A. Yes.

Q. Could you tell from your examination of it how many acres were meadow land that had been cut this year?

A. I think I could reasonably tell that, yes.

Q. About how much, in your judgment, was there?

A. About 15 or 16 acres. Now I am giving you that from memory.

Q. Did you see the hay or grass that came off of it?

A. No, I did not.

Q. You don't know how much hay was cut?

A. I can't say.

Q. You don't know how much hay was ever cut off of it?

A. No, I can't say.

Q. Was there any other crop that had grown upon it this year, apparently?

A. I don't think so.

Q. Was there any evidence of any part of the land ever
61 having been cropped with the exception of this small parcel
that you speak of that had been apparently farmed a couple
of years ago?

A. There was fairly reasonable evidences of it on account of the
outlook of the land.

Q. But, of course, no evidences as to what had been raised or how
much?

A. No.

Q. And how many acres were there that you thought had been at
one time put into corn?

A. Well, there was about four acres of that piece that showed the
evidence of corn stubble; there was some of the corn stubble there.

Q. That had not been grown this year?

A. No, sir.

Q. And possibly not for three years back?

A. Well, I think not; it was recent; a man might be mistaken as
to the year, but it was recent; the year before that could have been.

Q. There wasn't anything there that showed that anything else
had been raised upon it, any other crop, the year before?

A. The hay.

Q. That is by sowing?

A. The fruit crop.

Q. I am not speaking of that as a crop.

A. No; I do not think so. That is my opinion.

Q. And you haven't any knowledge yourself about how much grain or how much hay or how much anything else has been grown upon the land in the way of crops or in the way of grass?

A. Not from my personal knowledge.

Redirect examination by Mr. ALEXANDER:

Q. How much did the Stephan farm bring? Senator Linson didn't ask you the price that farm brought?

A. It brought \$22,500.

Q. For how many acres?

A. I think I have testified to the fact that nobody really knew how many acres there was into it. The farm was assessed at 40 acres, in the town of Esopus.

62 (Com. NICOLL:)

Q. What was the price?

A. \$22,500.

Q. You testified to Senator Linson that you sold one farm of 79 acres about 16 miles from Kingston?

A. Yes, sir.

Q. Near the railroad; that was the first farm about which you spoke on your cross-examination?

A. Yes.

Q. Was there any part of that farm mountain land?

A. Yes.

Q. About how much of it?

A. Oh, this I would have to take from memory—about 15 acres, I should judge; I might be mistaken in that; I think that was the understanding, that it was about that.

Q. What is the fair, reasonable market value of mountain land?

Mr. LINSON: Objected to as immaterial and improper.

Question withdrawn.

Q. Was any of the land that you had anything to do with, in buying or selling, a part of a reservoir site?

Mr. LINSON: Objected to as immaterial and incompetent.

The CHAIRMAN: I do not think it is material, but I will let him answer it.

Petitioner excepted.

A. No, sir.

Recross-examination by Mr. LINSON:

Q. How many acres of the Stephan farm were sand?

A. I don't think any one could answer that, Senator.

Q. Was there sand in sight?

A. Well, I think so, but I don't think any one could fairly say

63 the number of acres there was of that because it was in such a condition that there was part sand and part that wasn't sand; I should judge there might have been 15 acres.

Q. How far was it from the creek?

A. Well, their direct route to the creek, the only route they had to get to the creek for loading purposes—that is what you mean.

Q. Yes.

A. Well, I should say close to 3,000 feet.

Q. 3,000?

A. Something in that neighborhood.

Q. And they could draw the sand down to the creek and load it on boats at that point?

A. Yes.

Q. It is nearer the creek in a straight line than that, isn't it?

A. Yes, it is, but there is no highway; that is in the village or town; they couldn't get it out.

Q. I say it is considerably nearer than that in a straight line?

A. Well, about 1,500 or 2,000 feet.

Q. It is how far from the brickyard, the Kingston City brickyards and the Port Ewen brickyards?

A. Oh, it is from—well about three miles to the nearest.

Q. Direct river navigation from that point?

A. That is the nearest I think to any brickyard point of any consequence. This here brickyard here in the city, you know, doesn't cut any figure in this matter.

Q. It isn't half a mile from that, is it?

A. Yes, it is.

Q. Well, not over that, is it?

A. Yes, it is over that.

Q. Well, I don't think it is, but maybe it is; how far is it from the brickyard at Kingston Point?

A. Well, about five miles; six miles.

Q. Oh no.

A. Yes. Why not?

Q. What, to South Rondout?

A. Yes.

Q. From Kingston Point?

A. Sure. You let me explain the matter.

Q. I am not testifying about it.

A. I am, but you see it is two miles at least to the old house and from the old house to East Kingston it must be about three miles.

Q. I am not talking about East Kingston; I am talking about the brickyards in the City of Kingston, known as Hutton's.

64 A. I thought you said Kingston Point. That would be about three miles.

Q. How far is it from the Port Ewen brickyard?

A. About the same distance; but they are not buyers of sand.

Redirect examination by Mr. ALEXANDER:

Q. In valuing this property for agricultural purposes did you take into consideration the value of any quarries upon the property?

A. I did not.

Q. You didn't include them at all?

A. I did not.

Q. Did you examine the property to see if there were any quarries on it?

A. I looked over it and I saw there were evidences of quarries. I am not an expert on the quarry business; I don't know but very little about it.

Q. So you valued it exclusive of any stone or any quarries on the property?

A. Yes, sir, I did.

THOMAS P. RICE, sworn for claimant, testified:

Examined by Mr. ALEXANDER:

Q. Mr. Rice, where do you reside?

A. City of Kingston.

Q. What is your business?

A. Architect and building superintendent.

Q. How long have you been an architect?

A. For the last six years.

Q. Have you supervised the construction of houses?

A. I have.

Q. And do you know the structural value of houses?

A. I do.

Q. How long have you been an architect?

A. Six years; I have done business six years.

Q. You have been in the business of supervising the construction of houses as a builder and an architect for six years?

A. For 13 years.

65 Q. Did you examine the house and other structures, including the barn, wood shed, chicken house, water closet and smoke house upon parcel 246, which was formerly known as the Jacob Hogan property, and which is now owned by the City of New York, and which took title from James P. McGovern, the claimant?

A. I did.

Q. Did you examine the house and other structures with a view of estimating the structural value of the house and the other structures on this property?

A. I did.

Q. And did you also estimate the structural cost?

A. I did.

Q. Now, will you state in your opinion what the structural value of the house and the various other structures were that you found on this property at the time you examined it?

Mr. LINSON: Objected to upon the ground it is improper, and that structural value is no evidence of market value.

Objection sustained; claimant excepted.

J. WALDO SMITH, sworn for claimant, testified:

Examined by Mr. ALEXANDER:

Q. Mr. Smith, where do you reside?

A. New York City.

Q. And your profession is that of civil engineer, is it not?

A. Yes, sir.

Q. And you are chief engineer of the Board of Water Supply of the City of New York?

A. I am.

Q. And you have been a civil engineer for how long?

A. Well, I graduated from school in 1877; I don't know as you would call me a civil engineer since that time.

Q. Quite a number of years?

A. Yes.

66 Q. You have had considerable experience in supervising the construction of water works and water powers?

A. I have.

Q. Which were to be used for various purposes and for the purpose of power?

A. A. Yes.

Q. Have you had any considerable experience in impounding waters and in reservoir sites?

A. Considerable.

Q. Have you studied up all the records on file in the public offices with relation to the most available source from which the City of New York may obtain an additional supply of water necessary to meet the growing needs of the city?

A. I have read the various reports that have been made from time to time, or a great many of them anyway, regarding the sources from which a supply of water may be obtained.

Q. Was there a demand for an additional supply of water existing on the part of the City of New York and has it existed for the last ten years or more?

Mr. LINSON: I object to that upon the grounds:

First, it is immaterial.

Second, that it is incompetent.

Third, that it is irrelevant.

Fourth, that it is improper.

Fifth, that it appears from the record upon which the Commission was appointed, and which is a part of the record before the Court, that there was such a demand, and that the officers charged with the duty of procuring an additional supply of pure and wholesome water, after due investigation and examination, selected the reservoir site in question as being the site of a reservoir for the purpose of supplying such pure and wholesome water to the City
67 of New York, wherefore such a demand and such adaptability is conclusively presumed in this proceeding, and is not a subject of testimony which can neither add to nor subtract from such presumption.

Sixth, that the evidence is improper because it is an attempt to

give evidence as establishing the value of the premises in question to the condemning party and not in the hands of the owner.

Seventh, that the evidence is improper because it appears from the record before the Commission, upon which it was appointed, that the property in question is of value for the purpose of supplying the City of New York with an additional supply of pure and wholesome water only in connection with a very large number of other properties belonging to different owners, which properties the owner of the parcel in question has no method of procuring neither the concurrence nor the consent of such owners, and that therefore any evidence of its value for reservoir purposes, or a demand for reservoir purposes is speculative.

After an extended argument by respective counsel, and pending decision, an adjournment was taken to Thursday, November 7, 1907, at 10 A. M.

THURSDAY, Nov. 7, 1907, 10 A. M.

The Commission convened pursuant to adjournment.
Same appearances as before.

Mr. ALEXANDER: Mr. Stephan, representing the Home Seekers' Co-operative Savings and Loan Association, is in Court and he would like to prove that mortgage and the exact amount due. I
68 think Mr. Burhans testified to the exact amount and I think it tallies with Mr. Stephen's figures. What is the exact amount?

Mr. STEPHAN: It is \$296.54.

FREDERICK STEPHAN, JR., sworn for claimant, testifies:

Examined by Mr. ALEXANDER:

Q. Where do you reside, Mr. Stephan?

A. Kingston.

Q. And what is your profession?

A. Attorney at law.

Q. Was an application made for a loan on this property which is known as parcel 246?

A. Yes.

Q. Prior to the time you loaned this money was there a mortgage on the premises which had been made by Van Velsen to Pierson?

A. There was.

Q. Was that mortgage paid?

A. That mortgage was paid by me.

Q. It was paid simply, but formal procedure wasn't taken to cancel the *lis pendens*?

A. I took no procedure in the matter because I was not the attorney for Van Velsen or Pierson. Van Velsen was the owner of the property and he came to the Association and made his application and informed us that the property was to be sold on the 29th day of January, 1903. I made a memorandum at that date right on this application, "Close up at once; property to be sold January

29, 1903, under foreclosure." This application was made on the 5th of January, 1903.

Q. This application for a loan to the Home Seekers' Co-operative Savings and Loan Association?

A. Yes.

Q. Before this loan was made was the mortgage from Van Velsen to Pierson paid off?

A. It was paid at the time with this very money.

69 Q. Out of this loan?

A. Out of this loan. I paid it to Charles W. Walton, who was the attorney for Pierson.

Cross-examination by Mr. LINSON:

Q. Were the costs of the foreclosure paid?

A. We paid everything.

Q. What is the amount that is due on your mortgage to the Home Seekers' Co-operative Savings and Loan Association, what is the correct amount, \$296.54?

A. \$296.54 is the amount now due to the Loan Association.

By the CHAIRMAN:

Q. And it became due on the 1st of this month?

A. It became due on the first Monday of this month.

Q. That was on the 4th?

A. The 4th day of November.

Mr. STEPHAN: I would like to offer the bond and mortgage in evidence.

Received and marked "Claimant's Exs. H. and I."

J. WALDO SMITH, recalled by Claimant.

Direct examination resumed by Mr. ALEXANDER:

Q. Was there a demand for an additional supply of water existing on the part of the City of New York, and has it existed for the last ten years or more?

Mr. LINSON: Same objection.

70 The CHAIRMAN: As to this particular question, we are unable to see that it can do any harm. Of course, it follows from the fact that these proceedings were taken and that the consent of the State to the proceedings on the part of the City of New York, as evidenced by the Act under which we are proceeding, was obtained, is a necessary indication that there was a demand from the City of New York for the supply of water, or an additional supply of water. It follows necessarily from the proceedings taken, and flows necessarily from the petition as originally filed, that there was such a demand, so that the evidence of itself is neither harmful nor valuable as I can see, and we are inclined to let him answer this question.

Mr. LINSON: If that is the ruling of the Commission, I except.

The CHAIRMAN: Perhaps I ought to proceed a little further, in

view of the argument that has been made by counsel on both sides. This is a question that ought to be reviewed, perhaps and we propose to give counsel an opportunity to review it.

We will permit counsel to make an offer of proof. Of course, we expect him not to offer any proof that he cannot actually make, but to make an offer of proof as to what he wants to prove in relation to the value of this property for reservoir purposes and storage purposes. We have come to the conclusion that the evidence is not admissible. Here is a man who owned a mountain farm, if you may term it so, on which, so far as it appears, and the fact is, I believe, as stated by counsel, that there was no water to be taken or appropriated by the City. He was one of 46 owners, limiting the statement to the parcels that are before this Commission. He could not have utilized his land for storage purposes, reservoir purposes, without the consent of the other owners. It was absolutely valueless for storage purposes without the consent of the other owners. Now,

71 when the oath of the Commissioners was filed the City of New York became vested with the absolute title to this property and it became too late then for him to obtain the consent of other owners to the use of it for storage purposes. Perhaps we can go a step further and says that there are a good many hundreds of other owners whose consent he would have to obtain before his land would become available to him for storage purposes or reservoir purposes. I do not agree with the doctrine of one of the English cases referred to that the right to obtain consent of other owners is a valuable right. It is too intangible and uncertain. It is too fanciful, it seems to me, to enter into any element of value as connected with this land. I think the authorities in this State and in Massachusetts—I know of one authority in this State and one in Massachusetts, which I have examined this morning—are adverse to the contention of counsel that this property, under the circumstances of its situation, as developed on this hearing and as appears by the maps and the deeds, can be enhanced in any way by any consideration of its value for storage purposes. It is different entirely from that class of cases where a man owns an entire pond which he may use for manufacturing purposes, or for any other purpose, or which he may, because of its vicinity to municipal corporations, consider valuable for public use, for water purposes for such corporations, and where he has the entire command and control and ownership of it. There it may be valuable for storage purposes. But here is a man who owned this land before any steps were taken by the City of New York to take it, who never apparently considered it of any value whatever for any other purpose than farm lands, and

72 could not possibly utilize it for storage or reservoir purposes without the consent of a large number of other owners, which he never obtained, or attempted to obtain until it was too late to do so, because of the vesting of the title in the City of New York, and it had no value in his eyes or in the eyes of anyone else for such purposes. There was no market for it for such purposes, and there could not have been. He could not have sold it for storage purposes until the City of New York instituted this proceeding, and he could

not himself have utilized it for storage purposes. I think that the reasoning is against the admissibility of that evidence.

Now, Mr. Alexander, I will admit the answer to this question, and I will allow you to make your offer as full as you will state as a lawyer you expect to be able to prove, and then we will exclude your offer and give you an exception, so that you will have every opportunity to review it.

Mr. LINSON: I except to the admission of the answer to this question.

The CHAIRMAN: We will admit this question upon the ground it is harmless in any event because the proceedings show there was a demand. It must be conceded that there was a demand for an additional water supply on behalf of the City of New York. I intend to exclude any evidence tending to show the value of this land for water purposes for the City of New York. I do not intend that that shall enter into this question.

Mr. ALEXANDER: Of course, I want to except to all the remarks of your Honor.

The CHAIRMAN: Yes.

Mr. ALEXANDER: I except to the statement: "I am satisfied that this could not be used for storage purposes in and by itself, and that there was no market for it."

73 The CHAIRMAN: Whatever I said upon that subject, I will give you an exception.

Q. (Question repeated.)

A. There has been no demand for additional water for the City which up to the present time has not been satisfied.

Q. This is to meet the demands of the immediate future?

A. The City of New York is growing and will in time need more water than is available from its present sources.

(The CHAIRMAN:)

Q. That is your conclusion from the situation?

A. Yes, sir.

Q. Within what time?

A. And as it takes a long time to gain that additional supply it has been thought, by the authorities having these matters in mind, that it was time that New York should prepare to gain such an additional supply.

Q. Do you know whether New York, or the inhabitants of the different Boroughs are now buying pure and wholesome drinking water from several private water companies?

Mr. LINSON: To that I make the same objection.

The CHAIRMAN: I will exclude that.

Mr. ALEXANDER: I except.

Q. Then at present, according to you, the people don't need any additional water for drinking purposes?

A. Not today.

Mr. ALEXANDER: I now offer to prove this: I offer to prove that

the cheapest and most available source from which the City of New York can obtain water is from the watershed of the Esopus and its tributary watersheds, Schoharie and Rondout.

Mr. LINSON: Does the Commission think it best that I should interpose my objection to each statement of Mr. Alexander?

74 The CHAIRMAN: No, I think not. If there is any of it incompetent, of course the whole of it is incompetent.

Mr. ALEXANDER: I offer to prove that the watershed of the Esopus contains a reservoir site known as the Ashokan reservoir site, a part of which this Commission is now condemning. That this reservoir site is the most valuable reservoir site within the State of New York. That this reservoir site is a natural basin located at an elevation of 600 feet above the sea level. That through this reservoir site runs a stream known as the Esopus, a never-failing stream, which contains pure drinking water of a hardness of 20 only; and that this water of the Esopus running through this watershed, and particularly through the Ashokan reservoir site, is needed and is absolutely necessary to temper the water furnished by the Croton watershed, which has a hardness of 40. That it is absolutely necessary for the City of New York to obtain also the waters from Jansen Kill and Wappingers Creek, on the easterly side of the Hudson River, in Dutchess County, and that these waters have a hardness of 90, and cannot be available to the inhabitants of the City of New York as drinking water without their being tempered by mixing the waters of the Esopus with those waters, making the Ashokan reservoir site particularly valuable to the inhabitants of New York City in this respect.

I also offer to prove that along the valley of the Hudson River, from Albany to New York City, are many growing cities towns and villages whose inhabitants need an additional supply at present and in the immediate future of pure and wholesome water, and that they can obtain a supply more cheaply from a reservoir to be
75 constructed by damming up the Esopus and impounding the waters of the Esopus in the Ashokan reservoir site than they can from any other sources in the State of New York.

I offer also to prove that this particular parcel of land, known as No. 246, has a storage capacity for water and could in itself, without any adjoining lands, be used as a reservoir.

I offer also to prove that this particular reservoir site of all reservoir sites in the three watersheds, the Esopus watershed, the Schoharie watershed and the Rondout watershed, is alone of sufficient capacity to hold the entire yield and run off of the Esopus watershed, and I also offer to prove that there are no other reservoir sites within the Esopus watershed which are sufficient in size, capacity, character or quality to hold the yield or run off of the Esopus watershed.

I also offer to prove that this particular parcel of land is a part of and absolutely necessary to the construction of the reservoir in the Ashokan reservoir site, and that the Ashokan reservoir could not be constructed without taking in this particular parcel of land.

I also offer to prove that the population of the City of New York and of its boroughs is growing very rapidly. That Yonkers, White

lains, Poughkeepsie, Albany, and many other cities along the Hudson are growing very rapidly in population. That at present these cities use one hundred million gallons per day of pure and wholesome water, and that there is a constant demand for more water.

I also offer to prove that under the Act the City of New York has right to sell the water at a profit from this very reservoir.

I also offer to prove that "no reservoir, or other structure for the storage or impounding of water, shall at any time be constructed within the drainage area of the Esopus Creek in the County of Ulster, other than that designated in the reports of William H. Burr, Rudolph Hering, and John R. Freeman to the Honorable George B. McClellan, mayor, chairman, board of estimate and apportionment of the City of New York, as to the Ashokan reservoir, the flow line of which shall not exceed elevation six hundred feet coast and geodetic survey datum." And that this particular parcel of land must necessarily be included in the construction of that reservoir which at present, by law, must be constructed.

I also offer to prove that this particular parcel of land in and by itself has a market value as being a part of the great Ashokan reservoir site.

I also offer to prove that it would cost the City of New York at least double the amount that it is now expending to obtain the necessary supply of pure and wholesome water from any other source, and that this particular source is the cheapest source.

I also offer to prove that: "Watersheds possessing the highest degree of availability for increasing the water supply of the City must, obviously, be so located as to require the least amount of construction work to bring the water into the distributing system. The watershed of Fishkill Creek fulfills this condition. The chief difficulty to be overcome in securing the Fishkill waters, or those still further north, and that which controls the shortest time in which a new supply can be obtained, is the large amount of tunnel construction for the aqueduct through the rough mountainous region lying between it and the Croton shed."

I also offer to prove that: "The upper watershed of the Esopus Creek lies on the southeasterly slope of the Catskill Mountains, and no limestone is found in all its area. That its waters, therefore, are of unusual softness." That at a point called Olive Bridge, on the Esopus, about 13 miles westerly from Kingston, there is the best dam site in any watershed for a large reservoir, known as the Ashokan reservoir site. That this dam site is an excellent dam site for a larger reservoir, known as the Ashokan, than ever yet constructed for storage purposes in connection with municipal water supply.

I also offer to prove that at present the inhabitants of the City of New York, known as Greater New York, are receiving from all their sources of water supply two hundred twenty million gallons of water per day, or thereabouts.

That the water which can be impounded in the Ashokan reser-

voir will furnish to the inhabitants of the City of New York five hundred million gallons of water per day.

I also offer to prove that the Esopus watershed "is characterized by extensive steep mountainous slopes and wooded areas of such character that it is safe to estimate its yielding capacity in connection with this reservoir at one million gallons per square mile per day."

I also offer to prove that the Ashokan reservoir site is the only site in any watershed, and in the state of New York for a reservoir which will not only store the entire yield and drainage of the Esopus watershed, but a part of the yield of the Schoharie and Rondout watersheds.

I also offer to prove that the watershed of the Rondout and Schoharie, the two contiguous watersheds, are free from limestone and that they are covered with a hard slate.

78 I also offer to prove that "the available yield of a watershed is also largely dependent upon the storage capacity or volume which can be developed in it, as the storage reservoirs must hold the surplus flood and other waters until they are needed in seasons of low water." The storage capacity of each watershed, of the following watershed, which I shall name has been definitely determined, and that the Fishkill watershed has an area of 153 square miles and stores 52,680,000,000 gallons; that the Wappinger Creek has an area of 172 square miles and a storage of 52,200,000,000 gallons; that the Jansen Kill has an area of 149 square miles and stores 17,150,000,000 gallons; that the Esopus has an area of 255 square miles and stores, as estimated here, 101,556,000,000 gallons; that the Schoharie has an area of 228 square miles and stores 65,585,000,000 gallons; that the Rondout has an area of 131 square miles and stores 20,531,000,000 gallons; that the Catskill watershed has an area of 163 square miles and stores 24,488,000,000 gallons.

I also offer to show the rates of yield as follows: The Fishkill watershed will yield approximately 60,000,000 gallons per day. The Esopus watershed in and of itself will yield 255,000,000 gallons per day. The Rondout watershed, which I offer to show will be diverted or may be diverted into the Ashokan reservoir basin, will yield 98,000,000 gallons of water per day. The Wappinger Creek watershed will only furnish 67,500,000 gallons per day, and the Jansen Kill 112,000,00 gallons per day.

I offer also to show that it is not advisable to construct a large number of relatively small reservoirs because small and shallow reservoirs would be not only more expensive to the City
79 of New York, but they are easily affected by organic growths, producing disagreeable tastes and odors, and that small reservoirs would not only be more expensive, but also would be sensitive to the influence of vegetation, swampy areas and other prejudicial features of reservoir sites. That furthermore, water passes through a small reservoir in a comparatively short time, so that the sterilizing effect of lying in a large reservoir for a long period is lost. Reservoirs of great capacity, with their increased depth and greater volume of storage are far less affected by organic growths or by other more or less prejudicial effects in smaller volumes of water. The

time required for the passage of water through a great reservoir has a most important influence in sterilizing the water, as most of the pathogenic bacteria in the water of a storage basin will die in two or four weeks.

I also offer to prove that the beneficial effects of the storage of water in reservoirs of great capacity are entirely too pronounced to be ignored, and it is absolutely necessary for the City to have the Ashokan reservoir site above all others, both for reasons of great economy and for the health and safety of the inhabitants of the City.

I also offer to prove that it is necessary for the other cities along the Hudson River to buy the water from this reservoir basin, both by reason of economy and on account of the protection of the health, life and safety of their citizens.

I also offer to show that it is absolutely necessary for the City of New York, in the immediate future, to obtain a reservoir site with a supply of water equal to at least 500,000,000 gallons per day.

80 I also offer to prove that the waters of the Esopus and Rondout Creeks are exceptionally desirable for public supply, and that they are the best waters that are available in any direction for an additional supply of water either to New York City or to any other cities, towns, and villages along the Hudson River.

I also offer to prove that the excellent character of the Esopus and Rondout waters renders highly improbable any temporary prejudicial characteristics, and that it is desirable both for the inhabitants of New York City and the inhabitants of all other cities along the Hudson River to control the mingling of such waters with others of less excellent quality to prevent the tastes and odors which develop in the other waters of the state which are now used for drinking purposes by the inhabitants of the various cities.

I also offer to prove that the waters of the Esopus are the most quickly available for a source of water supply either to New York City, Yonkers, Albany or other cities.

I also offer to prove that the Ashokan reservoir site has the great advantage of a higher elevation than any other reservoir site of equal storage capacity in the State of New York. That on account of the elevation of this reservoir site the water will flow from it by the force of gravity, thus obviating the enormous expense entailed by pumping water up into the high office buildings and other places in the City of New York, Yonkers, and all other places along the Hudson River. And that the waters of the Esopus which run through the Ashokan reservoir site are of such a degree of softness that millions of dollars per annum will be

81 saved to the inhabitants of New York City, Yonkers, and other cities and villages along the Hudson River by reason of the fact that these waters will not cause boilers in the cities to be covered with mineral matter and will not necessitate the cleaning of boilers which the waters at present used by these various cities now cause by the incrustation.

I also offer to prove that this particular reservoir site, the Ashokan reservoir site, has many elements of value, such as the slope of the

sides, which slope very perceptibly makes the run-off of the watershed much more rapid than any other watershed.

I also offer to prove that other reservoir sites now being used by the City of New York and other cities are at a comparative low elevation, most of them being from about 200 to 250 feet above the sea level, necessitating in many cases a very large expense for pumping the waters which flow from these reservoirs.

I also offer to prove that it is necessary for the fire departments of the various cities along the Hudson, and of the City of New York, to get a great head on, and the waters flowing from this particular reservoir site will flow so rapidly by force of gravity that this particular site is of enormous value generally in the open market, and, therefore, that all parts of this site are of considerable value other than as farm land.

I also offer to prove that the supply from this reservoir site will not be temporary, but may be used for all time and will be just as permanent as the Croton water supply has been. That the City of New York, in the language of Mr. J. Waldo Smith, Chief Engineer, who is the witness now on the stand, "has reached the limit of the Croton supply and is going to do just what it did before, reach out and try to take the nearest source of supply, and the one that is the best and purest and cheapest. That it is just as permanent as the Adirondacks, and it will be far cheaper; it will be better; and the City is going to get it a great deal quicker—and that is most important of all." That "this seemed to be the only place left for the City to get water." That in the opinion of Mr. Smith, using his language, "I believe it is the only place, and I believe it is the best place."

I also offer to prove that "the minimum flow of the Hudson River at Poughkeepsie is eight hundred to a thousand million gallons a day. That point is only a little above the influence of salt water, and if water be taken there reservoirs must be built to compensate the flow, or there would be salt water in the pipes."

I also offer to prove that the supply from the upper Hudson, polluted as it is, would cost the City more than the Catskill water. That "there is no instance in this country," in the language of Mr. Smith, "where a city has taken a polluted supply and filtered it, if an unpolluted supply was available at a reasonable cost."

I also offer to prove that there has been a demand both on the part of the City of New York and other cities for an additional supply, and also a demand for reservoir site property.

I also offer to prove that there has been a demand on the part of the State of New York for reservoir site property for the purpose of furnishing the State a water supply.

I also offer to prove that that subject has not only been agitated but discussed, and the State of New York, through its Board of Water Supply, that is, the State Board of Water Supply, is now considering the subject of obtaining a reservoir site for the purpose of furnishing water to a large number of other cities in the northern part of the State of New York and elsewhere in the State of New York.

I also offer to prove that the Ashokan reservoir site, which the City of New York is now condemning, has an intrinsic value of \$34,000,000, and that it has a fair and reasonable market value of at least \$14,000,000.

I offer to prove that private capital, by constructing this reservoir and impounding the waters of the Esopus at this point and doing just what the City of New York is now doing, could make a net profit, by selling these waters to the inhabitants of the City of New York and to the inhabitants of Yonkers and other cities along the Hudson River, of \$20,000,000 per year.

I offer to prove that the complete cost of construction of a reservoir of the capacity that the City of New York contemplates building with the necessary aqueducts, etc., to furnish water to the inhabitants of New York City and to the inhabitants of the other cities mentioned in the Act, would be \$132,000,000.

I offer to prove that the nearest available sources of water supply next to the Esopus watershed are the Rondout and Schoharie watersheds, and that it would cost double the amount of money to take water from the Schoharie and Rondout watersheds and furnish it to the farthest city in the State whose inhabitants would be customers for this water.

I also offer to prove the fair and reasonable market value of this particular piece of property, known as parcel No. 246, taking into consideration the most advantageous use to which it may be put.

84 I also offer to prove that the most advantageous use to which this particular parcel of property may be put is to use it as part of a reservoir for the storage of pure and wholesome drinking water.

I also offer to prove that this particular parcel of land, in conjunction with contiguous parcels of land, constitutes a reservoir site, and that many reservoirs of different capacities may be constructed on this particular parcel of land and on other parcels of land contiguous to it, and that it is not absolutely necessary to construct a reservoir of a storage capacity equal to that which the City of New York is now constructing. I also offer to prove that not long since the City of Kingston actually had before its consideration taking a part of this very reservoir site for the purpose of constructing a reservoir to supply an additional supply of water to the inhabitants of the City of Kingston.

I also offer to prove that a demand exists on the part of the inhabitants of the City of Kingston for an additional supply of pure and wholesome water.

I also offer to prove that this particular reservoir site, and the particular parcel of land known as No. 246, which is now before this Commission for consideration, may be used as a storage reservoir for the purpose of furnishing electrical and other power to the inhabitants of the various cities, towns and villages not only along the Hudson, but all over the State of New York and elsewhere.

I also offer to prove that this Ashokan reservoir site is an ideal site, containing all the essentials for a storage reservoir which would

85 furnish enormous electrical power, and that such an enterprise could be carried out at an enormous profit, even at a much greater profit than by using this reservoir site to construct a storage reservoir for the purpose of furnishing an additional supply of pure and wholesome water.

Furthermore. I offer to prove all of the capabilities possessed by this particular parcel of land and possessed by the reservoir site of which it is part.

Lastly, I offer to prove the fair and reasonable market value of this particular parcel of land, taking into consideration all of the elements of value comprised in it, including that element of value on account of its natural location and conformation as part and parcel of a natural reservoir site of enormous value.

The CHAIRMAN: This you make as one continuous offer so that you can raise the entire question?

Mr. ALEXANDER: I would like a ruling on each separate fact.

The CHAIRMAN: We reject the offer and exclude it.

Mr. ALEXANDER: I except. May I have that rejected as to each fact?

The CHAIRMAN: It is possible that it might be competent to prove some one fact. I do not know. I suppose when a man makes an offer he intends to prove every part of it. You were told and I supposed, and I suppose still, that you would not make any offer which you would not prove. Now if you consider all this evidence as competent and material you have an exception to it and to every part of it, if you want it.

Mr. ALEXANDER: I want an exception to each fact offered by me to be proved in that offer.

I understand your Honor rules out every fact that I offer to prove in that offer.

86 The CHAIRMAN: We reject this offer as now made, and we will give you an exception.

Mr. ALEXANDER: Then I will ask the stenographer to read the first part of this offer.

The CHAIRMAN: I will not rule upon it in that way. You can make your offer separately, if you desire to.

Mr. ALEXANDER: I offer to prove the fair and reasonable market value of this piece of property, taking into consideration that element of value which gives it an enhanced value because it is part of a natural reservoir site.

The CHAIRMAN: That we exclude.

Mr. ALEXANDER: I except. I offer to prove the fair and reasonable market value of the Ashokan reservoir site which the City of New York is now condemning.

The CHAIRMAN: We will exclude that.

Mr. ALEXANDER: I except.

The CHAIRMAN: I assume your objection goes to this offer?

Mr. LINSON: I should certainly object to the evidence if it were offered.

The CHAIRMAN: You object to this offer?

Mr. LINSON: Yes, I interpose to the offer the same objection upon which your Honor ruled

Mr. ALEXANDER: I have assumed there was an objection.

Mr. LINSON: To each of these offers.

The CHAIRMAN: All these offers are objected to, and the whole offer is objected to, and the rulings are upon the objection.

Mr. ALEXANDER: I offer to prove that the Ashokan reservoir site is the cheapest, best and most available site for the purpose of enabling any customers for water to obtain an additional supply of pure and wholesome water.

The CHAIRMAN: I will exclude that.

87 Mr. ALEXANDER: I except. I offer to show that the Ashokan reservoir site, that the City of New York is now condemning, has a fair and reasonable market value in the open market.

The CHAIRMAN: We will exclude that under the circumstances of this case.

Mr. ALEXANDER: I except. I renew my offer and make each part of the first offer which I made a separate and distinct offer to prove each and every fact therein contained.

The CHAIRMAN: We decline to rule upon that in any other way than we have already ruled.

Mr. ALEXANDER: I except.

Claimant rests, Mr. Alexander reserving the right to call Mr. Donihue, Mr. Boice and Mr. Kenney later, when they arrive.

Mr. LINSON: I will call my witnesses on the farm values.

JOSEPH S. HILL, sworn for petitioner, testified.

Examined by Mr. LINSON:

Q. You reside at West Shokan, Mr. Hill, and have heretofore testified before this Commission in other cases with regard to certain real estate values in their section?

A. Yes, sir.

Q. Do you know this parcel No. 246, which is put down on the list in the name of Jacob Hogan?

A. I do.

Q. How long have you known it?

A. Why, I have known it for a great many years; probably 40 years I have known the property.

Q. Have you examined it recently with a view to estimating its fair market value and giving testimony in this case?

A. I have.

88 Q. When did you first make that examination?

A. I made the first examination on August 6th, and again on October 30, 1907.

Q. Did anybody accompany you, and if so, whom?

A. Mr. James McMillin accompanied me.

Q. Will you state what you did with a view to examining it and appraising it?

A. We went over the property and traced up the boundary lines all around it and then made a careful inspection of the land, all of

it, and took into consideration, the best we knew how, all the elements of value, including the buildings, house, barn, and the other out buildings, and took measurements of the house and looked over the different qualities of land on the premises.

Q. Describe this farm?

A. Well, the farm lies something like half a mile from the Olive Branch Station along the line of the old Ulster & Delaware road, at the junction of two roads, a road running along the front and on the west side of the farm, and there is a road leading over from the town of Hurley into the town of Marbletown. The land is rather uneven. There is some land that is cleared; much of it has been cleared, but has grown up of late years to brush. On the back side of the farm, or south side of the farm, I think there is considerable of the farm that has never been cleared, but the timber has been mostly cut off from it and there is a growth there of small woods. On the two far corners of the farm—it is a peculiar shaped tract—there is a parcel running right down into the center or about the center of the farm that belongs to or is put down I think to some man by the name of Swasey; I think that is the name.

Mr. ALEXANDER: I move that be stricken out. He says a certain part of the farm in the center has been put down to a certain party.

The CHAIRMAN: He is describing it, we have the maps here.

89 The WITNESS: I mean on the maps. The only object of that is on the far corners of these two points of land there is a little timber of a larger size, a very little.

Q. In your opinion what was the fair market value of the farm at the time the City acquired title?

A. \$2,800.

Q. In that do you include the 4.653 acres not taken?

A. I do not.

Q. You mean by that then that the value of the part taken in your judgment was how much?

A. \$2,800.

Q. As I understand you that is your estimate of the part taken?

A. Yes, sir, that is my estimate of the part taken.

Q. Now in your judgment what is the total value of the whole farm?

A. \$1,436.

Q. You mean \$2,836?

A. \$2,836; that is the value of the land.

Q. In your judgment what would be the value of the 4.653 acres after the 60.459 acres were taken?

A. \$36; \$8 an acre.

Cross-examination by Mr. ALEXANDER:

Q. Mr. Hill, how many times have you been a witness for the City in these proceedings?

A. I think about 20 times; I think they had me about that number of times.

Q. Are you engaged in any other business at present besides being a witness for the City?

A. I am, yes, sir.

Q. What business?

A. Insurance business; I also conduct a farm.

Q. Where is your place of business?

A. My place of business is at West Shokan.

Q. Have you ever bought any property that was a part of a reservoir site?

A. I have not; no, sir.

90 Q. Have you ever acted for others in buying or selling any part of property that formed a part of a reservoir site?

A. I have not.

Q. Do you know anything about the value of a reservoir site in the Ashokan watershed, the Ashokan reservoir site?

Mr. LINSON: I object to that upon the grounds which I objected to certain testimony asked this morning from J. Waldo Smith and to the offer of testimony made in connection therewith.

The CHAIRMAN: Do you mean for reservoir purpose? If you mean to ask him if he knows anything about the value of land embraced in this reservoir section I will admit it.

Mr. ALEXANDER: No, I do not. I ask him: "Do you know anything about the value of the Ashokan reservoir site?"

The CHAIRMAN: I think I will exclude that. I do not mean to exclude you from asking him anything about the value of land embraced within that site.

Exception.

Q. Would you as a real estate expert, if this particular piece of property, parcel No. 246, had an element of value on account of its adaptability and availability to be used in conjunction with other adjoining parcels as a reservoir site, take such element into consideration in estimating the fair and reasonable market value of this property?

Mr. LINSON: To that I make the same objection.

Same ruling and exception.

Q. Do you know the fair and reasonable market value of this particular property, taking into consideration the element of value by reason of the fact that it is a part of a reservoir site?

Same objection, ruling and exception.

91 Q. In estimating the value of this property did you simply take its value as farm property?

A. I took its value as I found it there.

Q. Well, for what purpose?

A. Well, for any purpose for which it might be used.

Q. What in your opinion is the most advantageous use to which this property could be put?

A. Well, so far as I know its present use is as advantageous as any.

Q. That is so far as you know?

A. So far as I know.

Q. Then you don't agree with your fellow expert who has testified before one of the Commissioners here, Mr. Johnson, who is an expert for the City, that the most advantageous use to which this property could be put is the very use which the City of New York is now making of it?

Mr. LINSON: Objected to as improper.

The CHAIRMAN: That is excluded.

Claimant excepted.

Q. Do you know that Mr. Johnson, an expert for the City, testified that the most advantageous use to which any of the parcels forming a part of this reservoir site could be put was to cover them with water?

Same objection, ruling and exception.

Q. Now exactly what did you take into consideration in estimating the value of this property?

A. Why, I think so far as I know I have stated. I took into consideration the value of the buildings and the value of the land and all the purposes for which they might be used and the value, whatever there was, in the way of wood upon the premises, and what I considered a fair market value for any purpose.

Q. Have you ever bought or sold real estate in the reservoir site section?

A. Not very much; I have bought some in the reservoir section.

92 Q. When?

A. Well, some time ago.

Q. How long ago?

A. Well, the last purchase I made was a dozen years ago.

Q. How long have you been in the real estate business?

A. Why, I haven't done very much real estate business.

Q. Well, when did you do your last real estate business before you came in here to testify as a witness?

A. I haven't testified that I did any real estate business.

Q. Did the fact that this was a part of a reservoir site enter into your estimate in valuing this land?

A. Why, I think I would have to answer yes to that question.

Q. It did; so that you as a real estate man, coming here as a witness, would take that into consideration in estimating its fair and reasonable market value?

The CHAIRMAN: He said he did take it into consideration.

Q. In your opinion as a real estate expert should a competent real estate expert take that element of value into consideration in estimating the fair and reasonable market value of this property?

Same objection; objection sustained; claimant excepted.

Q. How much did that enter into your calculations?

Same objection, ruling and exception.

Q. Have you had any experience in forestry?

A. Why, I have all my life more or less up to a few years ago, by cutting wood and timber; I have considerable timber land at this time, if that is what you mean by the term forestry?

Q. Do you know what the term "forestry" means?

93 Mr. LINSON: Objected to upon the ground the word has two meanings, and it is improper.

The CHAIRMAN: He may ask it.

Petitioner excepted.

A. I don't know.

Q. What are the elements which make growing timber of value? Please state them to the Commission. I am asking you this question for the purpose of ascertaining what you know on the subject.

A. As I understand that question now it is this: What value timber of certain size, under certain conditions, would have at some future period. Is that the idea?

Q. (Question repeated.)

A. Well, the elements are soil and location, as I understand it, and the kind of timber that is growing on a certain piece of property.

Q. Would you consider young timber of greater value if it protected mountain streams than if it didn't?

Mr. LINSON: I object to that.

The CHAIRMAN: I will exclude it. It is utterly immaterial. Claimant excepted.

Q. How near to the Esopus is this timber land?

A. Oh, this timber land is perhaps in a straight line three miles from the Esopus.

Q. Did you measure it?

A. No, I did not.

Q. That is a wild guess on your part?

A. Well, that is my judgment in the matter. As the stream flows it is much farther than that.

Q. Now you have averaged this piece of property, including the buildings and everything else, at the rate of about \$40 an acre, have you not, or \$45 an acre?

A. I didn't average it that way.

Q. That is the way it averages on your estimate, doesn't it?

A. That would be about it.

94 Q. Have you a scale of prices that you testify to in these proceedings?

A. I have no scale of prices, no, sir.

Q. Have you ever testified to any land before any Commission, ordinary land of the same general character, as being worth more than \$45 an acre?

A. I think I have, yes.

Q. What land?

A. Why, I think that there are a number of parcels that I have testified to as being worth more than that.

Q. Did Mr. McMillin agree with you as to the price?

A. He did, yes, sir.

Q. You both agreed?

A. Yes, sir.

Q. You didn't talk it over together?

A. We did talk it over a great deal.

Q. You talked it over and finally agreed on this price?

A. Yes sir.

Q. Did he state a different price before you agreed?

A. Why, I don't think that we absolutely agreed on everything without a little consultation.

Q. Now what was the character of the house on this property?

A. The house on this property is a one and a half story frame shingle and felt roof, 18x22, with a lean-to one story, 12x14, a kitchen one story, 16x20.

Q. What do you call a "lean-to"?

A. What we countrymen call a lean-to is a building built up against the main building in that form (ind.).

(Mr. LINSON:)

Q. The roof sloping in one direction?

A. The kitchen has a peaked roof running in this (ind.) form against the house.

Q. What were the dimensions of the so-called lean-to?

A. 12x14.

Q. What was it used for?

A. Why, I presume it was used for a summer kitchen, or a kitchen.

Q. Did you go into the lean-to?

A. I couldn't get in; the house was locked up.

Q. Did you go into it to examine the house?

A. I did not; the house was locked up.

95 Q. What do you consider to be the fair and reasonable value of the house as it stood?

A. \$900.

Q. Now, will you give me the fair and reasonable value of the other structures?

A. The barn, \$425; the chicken house, \$20; wood house, \$30; the summer kitchen, 7x8, \$15; toilet, \$5; the smoke house \$5.

Q. Any wells on the property?

A. I didn't see any.

Q. Did you look for them?

A. I did.

Q. Any quarries on the property?

A. There is some.

Q. You didn't take them into consideration, did you?

A. No, sir, I did not. If there is any quarry value—

Q. (Int'g.) For the purpose of valuation did you divide the land up into sections or acres?

A. Well, we looked it over separately, but we didn't put any separate values upon the different qualities of land.

Q. How much an acre did you value the land?

A. Why, I think it is about \$22 an acre or a little more than that.

Q. About \$22 per acre; have you had any experience in constructing houses?

A. Very little.

Q. Have you ever bought and sold houses of a similar character to what you found on this property?

A. I have not.

Q. Have you had any experience in constructing barns, chicken houses, wood houses, summer kitchens, toilets or smoke houses?

A. I have had some experience.

Q. Now what have you constructed, barns?

A. I built an addition to my own barn, and I built a wood house.

Q. I didn't ask you about additions; have you ever constructed a barn?

A. No, sir, I have not.

Q. Have you ever constructed a chicken house?

A. Yes, sir, I have.

Q. What were the dimensions of this particular chicken house?

A. That I constructed?

value if it protected mountain streams than if it didn't?

96 Q. No, the one you found on this property.

A. This chicken house I think was 7x12.

Q. How high was it?

A. About six feet on the back and a little higher on the front.

Q. Of what materials was it?

A. It is I think part hemlock and part spruce.

Q. Are you a judge of woods?

A. Well, I don't know whether I——

Q. (Int'g) What would it cost to construct a chicken house?

Mr. LINSON: I insist that an answer be given to the question before that.

The WITNESS: I don't know whether I am a good judge of woods or not.

Q. What would it cost to construct the chicken house that you found on this property?

Mr. LINSON: Objected to as improper.

Objection sustained, claimant excepted.

Q. What would it cost to construct the house—that you found on this property?

Same objection, ruling and exception.

Q. What was the condition of the house; describe its condition?

A. Why, the house as I saw it was a house that has been built for quite a long time; the most of it was rather cheaply constructed originally.

Mr. ALEXANDER: Just a minute. I move to strike that out.

The CHAIRMAN: Strike that out, "rather cheaply constructed originally."

Mr. LINSON: I except.

The WITNESS: Well, the house has been built some time and is not in what I consider very good repair.

Q. Well, now, in what respect is it not in good repair?

A. Well, it has on a part of it a very poor felt roof, and
97 the other parts of it the material and the general condition of the house I didn't consider was good.

Q. Do you know anything about felt roofing?

A. I do, yes, sir.

Q. Ever have any experience with it?

A. Yes, I have used considerable of it.

Q. Where?

A. On my house at West Shokan and on my barn.

Q. Is that the sum total of your experience in felt roofing?

A. That is about the sum total of my experience.

Q. Putting a felt roof on your house and barn?

A. No; my experience has been that I have had to renew it three times in six or seven years.

Q. Are there different kinds of felt roofs?

A. There are.

Q. And without examining the inside of the interior of this house at all you testify here under oath that the house was in poor condition?

A. Well, I said the outside of the house.

Q. I didn't understand you to say the outside of the house.

A. I think I did. I saw the inside of the house through the windows; that I didn't consider sufficient examination to be able to testify from.

Q. Do you consider the fact that this property faces for a considerable distance on two roads to add anything to its value?

A. Very little. I consider the value of any property is enhanced by being on a road.

Q. How much does that enhance its value?

A. Well, I don't know how much. If it were off of the road, why, I would consider it was worth less than if it was on a public highway.

Q. Have you ever had any experience in boarding houses sites?

A. Well, I have known of a great many boarding house sites; I kept a boarding house myself.

Q. In your opinion would the location of this property make it a suitable boarding house property?

A. I wouldn't so consider it.

98 Q. Would the land be in a suitable location to be used for boarding house purposes providing there was a proper boarding house on it?

A. Well, I wouldn't consider it a good location.

Q. Give your reasons why you wouldn't consider it so.

A. Well, from my point of view it is not a good location because the ground about it is low, all of it is swampy, and during a certain period or portion of the year when boarders are apt to assemble in the country there is lots of mosquitoes, and I found mighty

poor water down there this summer when I was there inspecting the property, and I didn't consider it an admirable site for a summer boarding house.

Q. It was all swampy?

A. I didn't say the property was all swampy; I said near there it was swampy.

Q. How much of it was swampy?

A. I didn't say this property was swampy.

Q. I understood you to say this property was swampy.

A. No; I did not; I said about there there was swamp land, all about there.

Q. How far from this property?

A. 500 yards perhaps, or 200 yards.

Q. Did this swamp land encircle the whole property?

A. No, it did not.

Q. How much of an area of swamp land was near there?

A. Well, the whole Beaverville swamp is in front of it, or within a couple of hundred yards.

Q. Are there any attractions such as falls in the immediate vicinity?

A. I don't know.

Q. Where is Bishop's Falls?

A. Four or five miles from there.

Q. Where is Horse-shoe Falls?

A. I don't know Horse-shoe Falls.

Q. Are there any other falls near the location of this property?

A. I don't know of any nearer than on the Esopus Creek, and they are all of them four or five miles away, Bishop's Falls and Beaverville Falls.

Q. How far from the railroad is this property?

A. I testified about half a mile.

99 Q. That is from the tracks of the railroad?

A. Yes, sir, from the depot. The tracks of the railroad are closer; they run perhaps, oh, a matter of three or four hundred yards.

Q. Now did you take into consideration in estimating the value of the property the value of any trees on the property?

A. I did.

Q. What value did you place on the apple trees?

A. I didn't put any special value on them; I considered them in connection with the farm as a whole.

Q. How much did you consider that they enhanced the value of the farm?

A. I didn't consider them separately.

Q. How much did you consider that the structures enhanced the value of the farm?

A. \$1,400.

Q. As I understand you the fair and reasonable value of these structures in your opinion, in the condition in which they stood, would be \$1,400?

A. That is my judgment.

Q. And they enhanced the value of the property to that extent?

A. That is my judgment.

Q. That is the way you estimate the values of property?

A. Yes, sir.

Q. Entirely?

A. Yes, sir.

Q. Have you ever known in your experience where the reasonable value of the structure enhanced the value of the property a great deal more than their own value?

Mr. LINSON: Objected to as improper.

The CHAIRMAN: That is excluded.

Claimant excepted.

Redirect examination by Mr. LINSON:

Q. When you speak of the reasonable value of buildings you mean, do you not, that that is what they enhance the property?

A. I do, yes, sir.

100 Mr. ALEXANDER: I object to his leading this witness.

The CHAIRMAN: He has already stated he considered they enhanced the value of the property. Besides you may assume that we know that a house or barn enhances the value of property.

JAMES McMILLAN, sworn for petitioner, testified:

Examined by Mr. LINSON:

Q. You have previously testified before this Commission in regard to the valuation of certain real property in the section?

A. Yes, sir.

Q. And you examine this property known as the Hogan property in company with Mr. Hill, as he has testified?

A. Yes, sir.

Q. At what time, Mr. McMillin?

A. Why, October 30th was the last time we were there; I think the other date was August 6th.

Q. I wish you would give a brief description of the farm in your own language?

A. The farm, as appears on the map, contains 65.112 acres. The part taken is 60.459 acres, leaving 4.653 acres. The farm faces the principal road, a road leading from Delaware County to Kingston, known as the old Ulster & Delaware turnpike, on the front. On the west side is a road leading from the town of Hurley over to Marbletown, in the vicinity of the Stone Church. The farm lays entirely on the south and east sides of these two roads. The roads come to a point near the buildings. The land immediately around and near by the buildings is cleared and contains an orchard and some other small fruit. In the rear of this land there is considerable land

101 which at some time apparently had been cleared and perhaps cultivated, but is now growing up to brush more or less. Still further on the extreme south side of the property, and sloping up towards the mountain, is a small growth of timber and some wood,

and on the two points, as I would describe it, that includes the parts not taken, there is a few sticks of marketable timber, perhaps a dozen or fifteen trees of small size are standing there now.

Q. Did you estimate the amount of wood that there was upon the farm?

A. No, we did not.

Q. What is it, cord wood or what is known as fire wood?

A. Why, fire wood I would consider it. Of course, it could be put in cord wood, but it would be rather small wood to be marketed.

Q. What is the distinction between what is commonly known in this locality as cord wood and simply fire wood?

Mr. ALEXANDER: Objected to as incompetent, what is known in this locality. I claim if it can be sold in any locality in the immediate vicinity at a profit it is competent.

Objection overruled; claimant excepted.

A. Well, wood that in my judgment would be profitable to cut into cord wood would be wood of some size; for instance, from at least six inches at the stump, at the ground; wood that is smaller than that could be used very well for fire wood. Of course, that same character of wood could be used for fire wood and also you could use the limbs of the larger trees for fire wood, which couldn't be very well used for cord wood, or crooked timber.

Q. Is it not true that when one speaks of cord wood they mean merchantable wood?

A. Merchantable wood, marketable wood.

Q. And is this in your judgment such wood?

A. I do not think there is much cord wood there.

102 Mr. ALEXANDER: I object to that as incompetent. This witness has not shown any qualifications that he has known anything about cord wood.

Mr. CHAIRMAN: Prove it.

Q. What is your business?

A. I am a farmer at present.

Q. How long have you been a farmer?

A. I have been more or less connected with a farm all of my lifetime.

Q. Where is your farm?

A. At Brodhead's Bridge.

Q. How far from Olive Branch?

A. I should judge about seven miles from where this property in question is located.

Q. Have you ever bought or sold real estate in that locality?

A. I have bought some real estate; I have never sold any.

Q. Have you ever bought woodland?

A. I did, yes, sir.

Q. Do you own woodland now?

A. I do.

Q. How much?

A. Well, I own perhaps 12 acres.

Q. Have you ever bought or sold wood?

A. I have never bought or sold wood, no.

Q. Have you known of its being bought and sold?

A. Yes, I have.

(The CHAIRMAN:)

Q. Cord wood?

A. Cord wood.

Q. And you have cut your own firewood?

A. Yes, sir.

Q. From your own woods?

A. Yes, sir.

Q. Now, Mr. McMillin, what in your judgment was the fair, market value for this entire farm of 65 and a fraction acres—I include now the part not taken by the City?

A. Including the buildings?

Q. Yes, the fair, market value of the whole place.

A. \$2,836.

Q. And what in your judgment is the fair, market value of the part taken by the City?

A. \$2,800.

103 Q. And the fair, market value of the remainder after that part shall be taken by the City or is taken by the City?

A. \$36.

Cross-examination by Mr. ALEXANDER:

Q. Have you ever bought any property that was a part of a reservoir site?

A. No, sir.

Q. Have you ever acted for others in buying or selling any part of property that formed a part of a reservoir site?

A. No, sir.

Q. Do you know anything about the value of the Ashokan reservoir site?

Mr. LINSON: Objected to upon the grounds as heretofore stated to evidence of that character.

Objection sustained; claimant excepted.

Q. Would you as a real estate expert, if this particular piece of property had an element of value on account of its adaptability and availability to be used in conjunction with other adjoining parcels as a reservoir site, take that into consideration in estimating its fair and reasonable market value?

Mr. LINSON: Same objection.

The CHAIRMAN: In that form I will sustain the objection. You may ask him whether he did that or not.

Claimant excepted.

Q. Do you know the value of this parcel of property for all of the purposes for which it can be used, including its use for reservoir purposes?

Same objection, ruling and exception.

Q. In estimating the value of this property you simply took its value as farm property, did you not?

A. As we found it, yes.

104 Q. I mean as farm property, as you found it, for farming purposes?

A. Yes.

Q. Did you take into consideration that it had any element of value as part of a reservoir site?

Mr. LINSON: Same objection.

The CHAIRMAN: He may answer that.

Petitioner excepted.

A. I did not.

Q. You didn't take that into consideration?

A. No.

Q. Do you remember having testified before Commission No. 7, composed of James Jenkins, Joseph D. Baucus and Peter C. Black, on October 9, 1907?

A. I don't remember that date in particular; I remember testifying.

Q. Do you remember that Joseph S. Hill, who has testified before you in this proceeding this morning, testified there?

A. I remember he testified in all the cases that I have been in, in all of the Commissions that I have been before.

Q. Do you remember that you were asked this question and that you gave this answer: "Q. You don't know anything about the value of this property as a reservoir site? A. No, sir." Do you remember having testified to that?

Mr. LINSON: Objected to upon the ground it is improper.

The CHAIRMAN: We will exclude it.

Claimant excepted.

Q. Do you remember that you testified before that Commission in answer to this question: "Q. You didn't take that into consideration?" And you answered, "I took it into consideration as Mr. Hill has testified to"?

Mr. LINSON: Objected to.

105 The CHAIRMAN: Excluded. He says he did not take it into consideration as to this piece of land.

Claimant excepted.

Q. When you say you have heard or you have known of cord wood being sold, you mean you know it the same as any other person knows of cord wood being sold; you don't mean to say you have dealt in it or you have any particular knowledge with respect to cord wood?

A. I never dealt in it, no; I have known of cord wood being sold in the community.

Q. How much of this property was covered by timber?

A. There is in my judgment about 20 acres, I should judge.

Q. You didn't measure it, of course?

A. No.

Q. That is your best estimate that you can make?

A. Yes.

Q. What character of timber was it?

A. Why, there was some small oak.

Q. What do you mean by "small"; what was the circumference or diameter of the trees?

A. We didn't measure the trees; there were trees probably four inches, five inches and perhaps six.

Q. In diameter?

A. In diameter.

Q. How high were they?

A. I couldn't tell you.

Q. You don't recall?

A. I do not recall the height of each particular tree; I know the timber was small.

Q. How many cords of wood could have been cut from this timber in your opinion?

A. To the acre, on this acreage?

Q. Yes.

A. I don't think more than five cords to the acre.

Q. Have you ever cut wood of a similar character for cord wood?

A. No, not for cord wood.

Q. Then how do you know how much could be cut?

A. That is my judgment.

Q. Is all of your judgment based in that general way?

A. I have known of cord wood to be cut and I know that you have to have quite good wood to get 10 cords to the acre.

106 Q. You heard Mr. Hill testify here, didn't you, this morning?

A. Yes.

Q. Would your testimony, if you were asked the same questions, be the same?

Mr. LINSON: I object to that as improper.

Objection sustained.

Mr. LINSON: I will withdraw the objection.

Q. If I asked you all the questions that I asked Mr. Hill this morning would you testify in the same way?

A. So far as my recollection now goes I would.

Q. You didn't consider the value of any stone or quarries on the property?

A. No, I did not.

JOSEPH S. HILL, recalled by petitioner:

Examined by Mr. LINSON:

Q. Mr. Hill, you have had some experience in dealing in cord wood, have you not?

A. I have, yes, sir.

Q. What experience?

A. Why, I have had a great deal, cutting on my own land, and I bought a great deal of timber land and had the cord wood cut on it;

I have bought and sold hundreds of cords of cord wood in my earlier days.

Q. In your judgment how many cords of wood are there to an acre on this property in question here?

A. Why, I think, from the experience I have had in cutting off timber lots or wood lots, that there wouldn't be five cords to the acre of merchantable wood, and that even would be small.

Q. What is the fair value of cord wood on the stump in that locality?

A. I should say perhaps \$1 a cord.

Q. Would this be classed, speaking generally, as cord wood or as fire wood?

A. It wouldn't be classed as a wood lot, as a cord wood lot, by any means; it wouldn't be profitable, because it is too small.

107 Cross-examination by Mr. ALEXANDER:

Q. You mean the timber is too small?

A. I mean the timber is too small to be profitable cut into cord wood.

Q. Would it be worth more or less to let the timber grow as it is?

A. Well, that I can't answer. I can't answer that question.

Mr. ALEXANDER: My experts are here now, and I will call them.

LAWRENCE KENNY, sworn for claimant, testified:

Examined by Mr. ALEXANDER:

Mr. ALEXANDER: Is it necessary to qualify this witness?

Mr. LINSON: No, I think he has been qualified before this Commission.

It is agreed that all of the quarry experts have already been qualified.

Q. Mr. Kenney, did you examine parcel No. 246, formerly known as the Jacob Hogan property?

A. Yes, sir.

Q. Did you find any merchantable stone or quarries on it?

A. Yes, sir, I did.

Q. Will you please describe them to the Commission?

A. Well, I found a quarry on the property which was located right east of the schoolhouse, or about a quarter of a mile from the main road, I should think.

Q. On which part of the property was that, on the 60 and some odd acres that are taken by the City?

A. Well, I understood it was the part to be taken by the City when I was there; I was told so; I didn't see it on the maps; I didn't see any maps of it.

108 (The CHAIRMAN:)

Q. Where is it located with reference to the house?

A. South; it is on the southeast part of the house, right east of the schoolhouse.

Q. Is it on the part taken by the City?

A. That is the way I understood it when I was there.

Mr. ALEXANDER: That will not be contested, will it?
It is conceded it is on the land taken.

Q. Now, will you describe what you found there?

A. Well, I found a quarry which was laying idle at the time; it had been worked for a number of years, and in my opinion it still contained some marketable bluestone.

Q. How much marketable bluestone in your opinion does it contain?

A. Well, there was a bottom bed there, as I would describe it, covering an area of about 90 foot square, four foot high.

Q. What in your opinion would be the fair and reasonable market value of the bluestone on this property?

A. \$437.

Cross-examination by Mr. LINSON:

Q. How many quarries that are now worked or had been worked did you find on the property?

A. Well, this is the only one that I went in.

Q. Could you locate it on the map for me?

A. It is about in here somewhere (indicating on map).

Q. About half-way across the lot?

A. I should think so, yes.

Q. Have you any knowledge of how long since it was worked, Mr. Kenney?

A. Well, I have not, no.

Q. Is this on the surface of the ground or below it, this stone that is there?

A. It is right on the surface; it is all uncovered; it can be seen.

Q. Can you see by the natural indications there what it has covered heretofore?

A. How large a space it has covered?

109 Q. Yes?

A. Oh, you can, yes; it has covered a large space.

Q. There has been stone taken out, a large amount of stone taken out; is that what you mean?

A. Yes.

Q. There is no indication to show when they stopped taking out the stone?

A. Why, I understood——

Q. (Int'g.) No, not what you understood from somebody else; are there any indications there on the ground it had been recently worked?

A. No, it hadn't been recently worked to my mind.

Q. Some years?

A. Some years; well, a year or more at least.

Q. How did you arrive at your figures of \$437 as being the value of the stone?

A. Well, I figure it up into cubic feet; it contained 32,400 cubic

feet. I deduct one-quarter of that for waste, and that multiplied by the market price—

Q. (Int'g.) Wait a moment. Give me the result of that?

A. Leaving 24,300 cubic feet.

Q. 24,300 cubic feet of stone still in the bed?

A. Yes.

Q. Go on?

A. At 36 cents a cubic foot.

Q. That would be how much?

A. \$8,748.

Q. How much, Mr. Kenney?

A. \$8,748.

Q. That in your estimate was the value of the stone where, delivered, I suppose?

A. Delivered to the docks, yes, sir.

Q. How far would they have to be drawn to get to the docks?

A. Well, to West Hurley or to Wilbur.

Q. If they were drawn to West Hurley how far would it be?

A. I should judge about three miles.

Q. If they were drawn to Wilbur how far would they have to be taken?

A. About ten miles, I should think.

Q. And the \$437 is arrived at by taking five per cent. of the value of the stone on the docks?

A. Yes, on the docks.

Q. As being the royalty?

A. The royalty, the value to the owner of the property.

110 Q. Did the fact that this quarry did not appear to have been recently worked lead you to doubt whether it could be profitably worked or not?

A. Well, no.

Q. There is a demand for bluestone, is there not, in this locality; it has a ready sale?

A. There is, yes.

Q. And there are other quarries in the neighborhood of Olive Branch that have been worked?

A. There are.

Q. And that are now being worked?

A. Well, I don't know many of them that are now worked or operated at the present time.

Q. Not about Olive Branch?

A. No, there are not many that I see.

Q. There are quarries through the reservoir district that are being worked?

A. There are, yes, sir.

Redirect examination by Mr. ALEXANDER:

Q. Are there any quarries on the land which the City is condemning for a reservoir that are being worked?

A. There are.

Q. That are now being worked?

A. Yes, sir.

HEWITT BOICE, sworn for claimant, testified:

Examined by Mr. ALEXANDER:

Q. Mr. Boice, what is your business?

A. Formerly been in the bluestone business.

Q. How long?

A. Thirty years.

Q. Did you do a large business?

A. I did. I am out of it now; I have been out of it five years.

Q. How large a business per year did you do in the bluestone business?

Mr. LINSON: Objected to.

The CHAIRMAN: He is qualified beyond any question.

Q. You saw the bluestone on this property?

A. Yes, sir.

111 Q. In your opinion what is its fair and reasonable market value?

A. Well, Mr. Kenney and I were there together and we decided on this, \$437.

Cross-examination by Mr. LINSON:

Q. And you got at it in the same way he did?

A. Certainly.

Mr. ALEXANDER: With the exception of Mr. Donihue's testimony and the certified copy of the deed to Mr. McGovern we rest.

ASA BARTON, sworn for petitioner, testified:

Examined by Mr. LINSON:

Q. Have you visited these premises in question with a view to ascertaining whether or not there were any bluestone quarries upon it, and if so the value of such quarries?

A. Yes.

Q. When did you make that examination?

A. The first time on July 22, 1907, and one of the other times—I think we were there three times—on August 20, 1907, and once since that; I haven't got the date.

Q. In company with whom?

A. In company with Mr. James O'Neil of West Hurley.

Q. Did you make a thorough examination of the premises with a view to ascertaining whether or not there were such quarries, and if so their value?

A. I did.

Q. In your judgment are there are quarries on the property which could be profitably worked?

A. No, sir.

Cross-examination by Mr. ALEXANDER:

Q. Is there any bluestone on the property?

A. There is blue rock.

Q. In your opinion has it any market value?

A. None whatever.

112 Q. Have you been in the bluestone business?

A. 36 or 38 years.

Q. Buying and selling bluestone?

A. No, sir; I am a quarryman. I have sold bluestone, but not to buy it.

Q. You never bought bluestone?

A. No, sir; I have bought out just a few, but not as a buyer of it.

JAMES E. O'NEIL, sworn for the petitioner, testified:

Examined by Mr. LINSON:

Q. Mr. O'Neil, you visited these premises in question with Mr. Barton with a view to examining as to whether or not there were any bluestone quarries upon the property, and if so their value?

A. Yes, sir.

Q. In your judgment are there any quarries upon it that could be profitably worked?

A. No, not that I could see.

Cross-examination by Mr. ALEXANDER:

Q. Any bluestone on the property?

A. Yes, sir.

Q. Have you bought and sold bluestone?

A. I have quarried bluestone and sold bluestone.

Q. You never bought any?

A. No.

Redirect examination by Mr. LINSON:

Q. How many years have you been in the quarry business?

A. As near as I can recollect about 35 years.

Q. At West Hurley or near there?

A. Well, I have been at West Hurley and I have been further on.

It is agreed that if Hugh Donihue were present in Court he would testify that he was a farmer and that in his judgment the
113 value of the part of the property in question taken, as a farm, was—the whole farm \$7,002, and for the part taken \$6,842, the same being exclusive of quarries or bluestone.

Mr. ALEXANDER: I offer these two photographs in evidence.

Received and marked "Claimant's Exhibits J and K."

Mr. LINSON: I offer in evidence five photographs.

Received and marked respectively "Petitioner's Exhibits 1, 2, 3, 4 and 5."

Case closed, Mr. Alexander to have permission to file the deed

heretofore referred to, the record of which was offered in evidence, the same to be known as Claimant's Exhibit E.

The foregoing case contains all the evidence given at the hearing before the commissioners of appraisal.

CLAIMANT'S EXHIBIT "A."

Deeds date- September 12th, 1906, made by Jacob M. Hogan and wife to Herman Aaron.

CLAIMANT'S EXHIBITS "B" AND "C."

Bond and Mortgage from Herman Aaron to Jacob M. Hogan for \$490, dated September 12th, 1906.

CLAIMANT'S EXHIBIT "D."

Satisfaction of Mortgage from Herman Aaron to Jacob M. Hogan, dated the 12th day of September, 1906; satisfaction piece being dated April 7th, 1907.

114

CLAIMANT'S EXHIBIT "E."

Deed from Herman Aaron and wife to James P. McGovern, of tract of which Parcel 246 is a part.

CLAIMANT'S EXHIBIT "F."

Map showing entire tract of property of which Parcel 246 is a part.

(Here follows map marked p. 114a.)

No 395.
 McGovern p. 114 a
 City of N.Y.

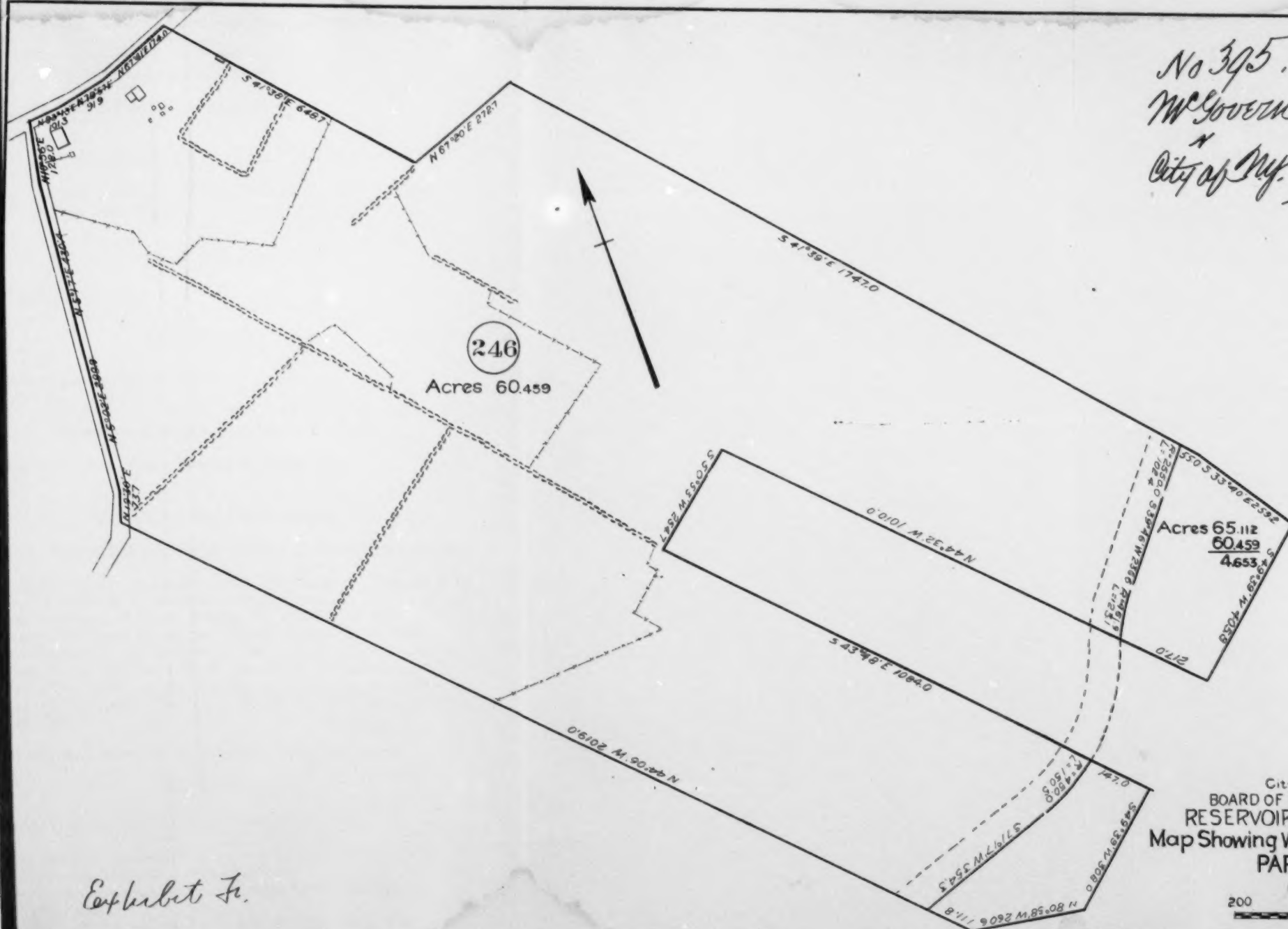


Exhibit Fe.

City of New York
 BOARD OF WATER SUPPLY
 RESERVOIR DEPARTMENT
 Map Showing Whole Property of which
 PARCEL 246

is a part
 200 0 200 Ft.

Acc. R R 681

CLAIMANT'S EXHIBIT "G."

Fruit trees and shade trees on the parcel.

CLAIMANT'S EXHIBITS "H" AND "I."

Bond and Mortgage made by Van Velsen to Home Seekers Co-operative & Loan Association.

CLAIMANT'S EXHIBIT "J."

Photograph of house.

CLAIMANT'S EXHIBIT "K."

Claimant's photograph of barn.

PETITIONER'S EXHIBITS 1, 2, 3, 4 AND 5.

Photographs of Buildings Erected on Parcel 246.

115 *Bill of Costs and Disbursements.*

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply for the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Towns of Olive, Hurley and Marbletown, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir, Section No. 6, Parcel No. 246.

Disbursements.

Charles O. Vogt for inspection and testimony.....	\$20.00
Thomas P. Rice for inspection and testimony.....	20.00
Lawrence Kenney for inspection and testimony.....	25.00
Hewitt Boice for inspection and testimony	50.00
J. Waldo Smith subpoena fee and mileage from New York, about 100 miles	9.00
Charles N. Chadwick subpoena fee and mileage from New	

	York, about 100 miles.....	9.00
116	Certified copy of deed	2.00
	Photographs	2.00
	For incidental expenses of witnesses, for meals, carfare and livery	6.84
	Total	\$143.84

Costs.

	Costs before notice of trial	\$15.00
	Costs after notice of trial	10.00
	Trial fee	30.00
	Total	\$198.84

STATE OF NEW YORK,
County of New York:

Jerome H. Buck, being duly sworn, deposes and says: that he is the attorney for James P. McGovern, the claimant herein. That this case was tried on November 6th and 7th, 1907. That the foregoing expenses and disbursements have been necessarily paid or incurred herein.

That the witnesses Charles O. Vogt, Thomas P. Rice, Lawrence Kenny, and Hewitt Boice attended court and gave testimony on the condemnation of the above mentioned parcel, and the sum asked for is the reasonable value of their services. That the witnesses Charles N. Chadwick and J. Waldo Smith actually attended court and gave testimony on this parcel, and had been paid the amounts mentioned. That deponent will hereafter submit affidavits of the expert witnesses as to the amounts paid them, as herein set forth.

Deponent therefore asks, that the claimant herein may be allowed the foregoing expenses and costs, and that an allowance of five (5%) per cent on the amount of the award, may be made to deponent.

JEROME H. BUCK.

Sworn to before me, this 17th day of December, 1907.

JULIUS MAYER HANSER,
Commissioner of Deeds, City and County of New York.

117 *Report of Commissioners.*

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply for the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Towns of Olive, Hurley and Marbletown, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Section No. 6, Ulster County, Ashokan Reservoir,
First Separate Report.

We, Edgar L. Fursman, of the City of Troy, Rensselaer County, New York; Edward H. Nicoll, of the Borough of Manhattan, in the City, County and State of New York, and Charles B. Cox, of the Village of Saugerties, Ulster County, New York, duly appointed Commissioners of Appraisal by an order of the Supreme Court in the above entitled proceeding, dated June 29th, 1907, to ascertain and appraise the compensation to be made to the owners and all persons in any manner interested in the real estate laid down on the map in this proceeding, filed in the office of the Clerk of the County of Ulster, May 8th, 1907, as Map No. 4, as proposed to be taken, acquired or affected for the purposes indicated in Chapter 724 of the Laws of 1905, and the Acts amendatory thereof, and to exercise and discharge all the powers and duties conferred upon such Commissioners by said Acts, and without unnecessary delay, to ascertain and determine the compensation which ought justly to be made by the City of New York to the owners or the persons interested in the real estate or any right, title, interest, term, easement or privilege pertaining thereto sought to be acquired, affected or extinguished by this proceeding, and to any owner or person interested in the real estate contiguous or adjacent thereto in any way affected by the taking of the said real estate or the taking or extinguishment of any interest therein, whether such adjacent or contiguous real estate is shown on the plan or plans, map or maps, or not, and upon such ascertainment and determination from time to time to report the same to the Court as provided in said Act, do respectfully report as follows:

That on the 22nd day of July, 1907, we, the Commissioners aforesaid, took and subscribed the oath required by the Constitution and that we held the first meeting of this Commission at the Court House in the City of Kingston, N. Y., on the 22nd day of July, 1907, at eleven o'clock in the forenoon, as directed by the order of this Court.

That on the 22nd day of July, 1907, the oath of the Commission-

ers was duly filed in the office of the Clerk of the County of Ulster and a certified copy thereof filed in the office of the Clerk of the County of New York on the 23rd day of July, 1907.

That we viewed the real estate laid down on the aforesaid map, including the parcels embraced in this report, and have carefully examined each parcel thereon shown, and thereafter heard
119 the testimony and considered and examined the claims presented to us which are herein reported on, and considered proofs and allegations of the persons claiming to be entitled to or interested in so much of the real estate laid down on said map as is reported on, and such proofs and allegations as have been offered by the City of New York.

That the testimony taken herein has been reduced to writing and is filed herewith, and we have annexed hereto a true copy of the map showing the parcels now reported on.

That after examining the said claims, proofs, allegations and testimony and making said views and examinations, and carefully considering the same, we did, all being present, and without any unnecessary delay, ascertain and determine the compensation which ought justly to be made by the City of New York to the owners of or persons interested in so much as is included in this report of the real estate sought to be acquired or affected by this proceeding.

A brief description of the several parcels here reported on shown on said map as taken or affected by these proceedings, the respective amounts of the compensation ascertained and determined upon by us as aforesaid, a statement of the respective owners or persons entitled to or interested in the same, and the amounts which seem to us proper to be allowed as expenses and disbursements, including reasonable compensation for witnesses and counsel fees to such attorneys as have appeared before us for parties to these proceedings, are as follows:

Parcel No. 224, taken in fee, containing 26.590 acres.

Parcel No. 226, taken in fee, containing 53.022 acres.

Parcel No. 228, taken in fee, containing 0.264 acre.

Parcel No. 230, taken in fee, containing 45.373 acres.

Parcel No. 237, taken in fee, containing 25.040 acres.

120

Parcel No. 246.

Taken in Fee.

All that certain piece or parcel of real estate situated in the Town of Hurley, County of Ulster, and State of New York, designated on the map hereinbefore referred to as Parcel Number 246, which said parcel is described as follows:

Beginning at the northeast corner of Parcel No. 241, in the southerly line of Parcel No. 251, at the intersection of the center lines of the Ulster & Delaware Plank Road and a road leading from Brown's Station to said Plank Road, and running thence along the said southerly line and the center line of said Plank Road, N. 83 degrees 13 minutes E. 101.3 feet and N. 78 degrees 57 minutes E. 51.5 feet

to the southwest corner of Parcel No. 252; thence along the southerly line of said parcel and still continuing along the centre line of said Plank Road, N. 78 degrees 57 minutes E. 40.4 feet and N. 67 degrees 41 minutes E. 174 feet to the northwest corner of Parcel No. 253; thence along the westerly line of said parcel, S. 41 degrees 38 minutes E. 648.7 feet to the southwest corner of same; thence along the southerly line of said parcel, N. 67 degrees 20 minutes E. 272.7 feet to the southeast corner of same, in the westerly line of Parcel No. 254; thence along the said westerly line, S. 41 degrees 39 minutes E. 1,747 feet to the most southerly point of said parcel; thence on a curve of 2,550 feet radius to the right 102.4 feet, S. 39 degrees 46 minutes W. 236.6 feet, on a curve of 461.9 feet radius to the left 123.1 feet to the most easterly point of Parcel No. 269; thence along the easterly line of said parcel, N. 44 degrees 32 minutes W. 1,010 feet to the northeast corner of same; thence along the northerly line of said parcel, S. 50 degrees 53 minutes W. 254.7 feet to the northwest corner of same; thence along the westerly line of 121 said parcel, S. 43 degrees 48 minutes E. 1,084 feet to the most southerly point of same; thence on a curve of 450 feet radius to the right 150.5 feet and S. 17 degrees 17 minutes W. 354.4 feet to the southeast corner of Parcel No. 245; thence along the easterly line of said parcel, N. 44 degrees 06 minutes W. 1,906 feet to the southeast corner of Parcel No. 247; thence along the easterly line of said parcel N. 44 degrees 06 minutes W. 113 feet to the most northerly point of said parcel, in the easterly line of before mentioned Parcel No. 241, said point being in the center of before mentioned road leading from Brown's Station to the Ulster & Delaware Plank Road; thence along the center line of said road and the said easterly line, the following courses and distances: N. 19 degrees 30 minutes E. 73.7 feet, N. 5 degrees 02 minutes E. 288.9 feet, N. 5 degrees 17 minutes E. 430.4 feet and N. 10 degrees 56 minutes E. 128 feet to the point or place of beginning; containing 60.459 acres.

Parcel No. 247, taken in fee, containing 0.314 acre.

Parcel No. 249, taken in fee, containing 0.328 acre.

Parcel No. 250, taken in fee, containing 1.521 acres.

Parcel No. 253, taken in fee, containing 3.834 acres.

Parcel No. 256, taken in fee, containing 0.600 acre.

Parcel No. 267, taken in fee, containing 0.144 acre.

Parcels 224 and 226.

The owners of said parcels are William Urban and Emmeline Urban. There is a mortgage of two hundred and fifty dollars (\$250.00) existing thereon, executed to Magdalena Barber and assigned to Lilius L. Cooper. Interest thereon is due from July 1st, 1907.

There was put in evidence the record of a mortgage from Jacob Hogan and wife to Alva H. Bogart, which mortgage is dated April 2nd, 1889, and recorded in Ulster County Clerk's Office, in Book

197, at page 35, the expressed consideration whereof is three hundred and fifty dollars (\$350.00).

122 There was also put in evidence the record of a mortgage from Samuel Staler to Jacob M. Hogan, dated August 6th, 1891, and recorded in said Clerk's Office in Book 208, at page 377, the consideration of which, as expressed therein, is two hundred and fifty dollars (\$250.00).

There was also put in evidence the record of a mortgage from Samuel Greenfield and others to Alva H. Bogart, dated February 23rd, 1893, and recorded in said office in Book 214, at page 512. The consideration expressed therein is three hundred dollars (\$300.00). There has been no evidence before us as to whether said mortgages last named have or have not been paid.

The amount ascertained and determined by us, as aforesaid, to be paid to the owners of and the persons interested in said land for the acquisition of the fee of the premises designated on said map as Parcels Nos. 224 and 226, and for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of four thousand five hundred dollars (\$4,500.00).

William Urban and Emmeline Urban are entitled to be paid the said sum of four thousand five hundred dollars (\$4,500.00), subject, however, to said mortgage of two hundred and fifty dollars (\$250.00) to Magdalena Barber, and subject also to said mortgage of three hundred and fifty dollars (\$350.00) to Alva H. Bogart, and of two hundred and fifty dollars (\$250.00) to Jacob M. Hogan, and of three hundred dollars (\$300.00) to Alva H. Bogart, provided the said last three named mortgages have not been satisfied, as to which we are without evidence.

Arthur A. Brown appeared before us as attorney for said owners, together with Harrison T. Slosson, as counsel, and we recommend

that the sum of two hundred and twenty-five dollars
123 (\$225.00) be allowed for counsel fees and sixty-five dollars (\$65.00 for expenses and disbursements, including reasonable compensation for witnesses' fees.

Parcel No. 228.

Frederick Hales, Sr., is the owner of said real estate. There is a mortgage now existing thereon, made by David Hogan to the United States Loan Commission, for three hundred and fifty dollars (\$350.00), on which there is now due the sum of seventy-three dollars (\$73.00), with interest from October 1st, 1907, at five per cent.

There is also a mortgage on record made by Richard Wager to Ambrose Wager, dated June 15th, 1871, and recorded in Ulster County Clerk's Office in Book 106, at page 602, the consideration whereof is three hundred and twenty-nine dollars and sixty-one cents (\$329.61). This mortgage covers Parcel 228 and other lands.

The amount ascertained and determined by us to be paid to the owners of and persons interested in said lands for the acquisition of the fee of the premises designated on said map as Parcel 228, and

for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of the said fee, for the purposes indicated in said Act, is the sum of seventy-five dollars (\$75.00).

The persons entitled to be paid the said sum are the owner above named, Frederick Hales, Sr., subject to the interest of the United States Loan Commissioners by reason of the mortgage aforesaid, and subject also to the interest of Ambrose Wager, provided the said mortgage of said Wager is still in force.

Arthur A. Brown appeared before us as the Attorney, together with Harrison T. Slosson, of Counsel, and we recommend that the sum of three dollars and seventy-five cents (\$3.75) be allowed
124 for counsel fees and twenty dollars (\$20.00) for expenses and disbursements, including reasonable compensation for witnesses' fees.

Parcel No. 230.

Stephen L. Angevine is the owner of said real estate. There are no encumbrances thereon.

The amount ascertained and determined by us to be paid to him as the owner thereof for the acquisition of the fee of the premises designated on said map as Parcel No. 230, and for all damages sustained or which may be sustained by him by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of one thousand nine hundred and fifty dollars (\$1,950.00).

Arthur A. Brown appeared before us as Attorney for said owner, together with Harrison T. Slosson, Counsel, and we recommend that the sum of ninety-seven dollars and fifty cents (\$97.50) be allowed for counsel fees and sixty-five dollars (\$65.00) for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 237. *

Frederick Hales, Sr., is the owner of said Parcel. Alva Bogart is the owner of a mortgage executed by Frederick Hales and wife, on March 18th, 1884, and recorded in said Clerk's office, in Book 169, at page 534, on which there is due the sum of one thousand one hundred and fifty dollars (\$1,150.00) with interest from April 1st, 1907, at six per cent.

There is also a mortgage dated January 7th, 1882, covering part of Parcel 237, on which there is due one hundred and fifty dollars (\$150.00) with interest for two years at six per cent. This mortgage was made, and seems by the testimony to be held and owned, by Charlotte Markel, and recorded in Ulster County Clerk's Office, in Book 158, at page 378.

125 On January 5th, 1882, Hales conveyed a portion of Parcel 237 to Charlotte Markel, by deed dated January 5th, 1882, recorded in Ulster County Clerk's office, in Book 249 of Deeds, at page 560. The consideration expressed in said deed is two hundred fifty dollars (\$250.00). The following is a description of the land conveyed by said deed:

"All that tract or parcel of land situate in the Town of Hurley, County of Ulster, New York; it being a house and lot and lying in Great Lots Numbers 2 and 3 in the first allotment of the Hurley Patentee Woods and lies on the south side of the public highway leading from the Plank Road to Marbletown (called the Markel Road) and is bounded as follows, viz.: On the northwest by said highway; on the southwest by lands of William F. Smeeds, southeast by lands of Ann Finley, northeast by land of Andrew Markel; containing about two acres of land, be the same more or less."

The amount ascertained and determined by us to be paid to the owners of and persons interested in said land for the acquisition of the fee of the premises designated on said map as Parcel No. 237; and for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of five thousand three hundred fifty dollars (\$5,350.00).

The persons entitled to be paid the said sum of five thousand three hundred fifty dollars (\$5,350.00) are Frederick Hales, Sr., owner, subject to the interest of the several mortgages above named.

Arthur A. Brown appeared before us as Attorney, together with Harrison T. Slosson, of Counsel, and we recommend that the sum of two hundred and sixty-seven dollars and fifty cents (\$267.50) be allowed for counsel fees and the sum of eighty-five dollars (\$85) for expenses and disbursements, including reasonable compensation for witnesses.

126

Parcel No. 246.

James P. McGovern is the owner of this parcel. There is a mortgage thereon held and owned by the Home Seekers' Co-operative Savings and Loan Association, on which there is due the sum of two hundred and ninety-six dollars and fifty-four cents (\$296.54), with interest from November 1st, 1907.

The amount ascertained and determined by us, as aforesaid, to be paid to the owners of and persons interested in the said land for the acquisition of the fees of the premises designated on said map as parcel No. 246, and for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of three thousand three hundred dollars (\$3,300.00).

The persons entitled to be paid the said sum of three thousand three hundred dollars (\$3,300.00) are James P. McGovern, subject to the interest of the Home Seeker's Co-operative Savings and Loan Association, owner of the mortgage above named. The amount of said mortgage, to wit, two hundred ninety-six dollars and fifty-four cents (\$296.54), with interest from November 1st, 1907, is payable to the Home Seeker's Co-operative Savings and Loan Association.

Jerome H. Buck appeared before us as attorney, and Edward A. Alexander as counsel, and we recommend that the sum of one hundred and sixty-five dollars (\$165) be allowed for counsel fees, and the sum of eighty-four dollars (\$84.00) for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 247.

School District Number Two, in the Town of Olive Branch; William Markle, Sole Trustee.

127 The amount ascertained and determined by us to be paid to the Trustee of School District Number Two, above named, for the acquisition of the fee of the premises designated on said map as Parcel No. 247, and for all damages sustained or which may be sustained by said School District or by said Markle as Sole Trustee, by reason of the acquisition, use and occupancy of the said fee for the purposes indicated in said Act, is the sum of seven hundred dollars (\$700.00).

The person entitled to be paid the said sum of seven hundred dollars (\$700.00) is William Markle, as Sole Trustee of said School District Number Two.

Arthur A. Brown appeared before us as attorney, with Harrison T. Slosson, as counsel for said Trustee, and we recommend that the sum of thirty-five dollars (\$35.00) be allowed for counsel fees and sixty-five dollars (\$65.00) for expenses and disbursements, including reasonable compensation for witnesses' fees.

Parcel No. 249.

Richard Hogan is the owner of this parcel. There are no encumbrances thereon.

The amount ascertained and determined by us to be paid to the owners thereof for the acquisition of the fee of the premises designated on said map as Parcel No. 249, and for all damages sustained or which may be sustained by him by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of one thousand eight hundred dollars (\$1,800.00).

Arthur A. Brown appeared before us as attorney for said Hogan, together with Harrison T. Slosson, of counsel, and we recommend that the sum of ninety dollars (\$90.00) be allowed for counsel fees and the sum of sixty-five dollars (\$65.00) for expenses and disbursements, including reasonable compensation for witnesses' fees.

128

Parcel No. 250.

Franklin O. Van Velsen is the owner of said real estate. There is a mortgage thereon, held and owned by the Home Seekers' Co-operative Savings and Loan Association, recorded in Book 384, at page 347, on which there is due the sum of one hundred sixty-three dollars and ten cents (\$163.10) with interest from November 11th, 1907.

The amount ascertained and determined by us to be paid to the owner of and persons interested in the said land for the acquisition of the fee of the premises designated on said map as Parcel No. 250, and for all damages sustained by them or which may be sustained by them, by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of two thousand two hundred dollars (\$2,200.00). The persons entitled

to be paid the sum of two thousand two hundred dollars (\$2,200.00) are Franklin O. Van Velsen, owner, subject to the interest of the Home Seekers' Co-operative Savings and Loan Association to the amount of one hundred sixty-three dollars and ten cents (\$163.10), with interest from November 11th, 1907, as above set forth.

Arthur A. Brown appeared before us as attorney for the Claimant, together with Harrison T. Slosson, of counsel, and we recommend that the sum of one hundred and ten dollars (\$110.00) be allowed for counsel fees, and the sum of sixty-five dollars (\$65.00) for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 253.

Daniel McAuliffe and Timothy McAuliffe are the owners of said parcel, on which there is no mortgage.

The amount ascertained and determined by us to be paid to 129 said owners for the acquisition of the fee of the premises designated on said map as Parcel No. 253, is the sum of two thousand three hundred dollars (\$2,300.00).

The persons entitled to be paid the said sum of two thousand three hundred dollars (\$2,300.00) are said Daniel McAuliffe and Timothy McAuliffe, owners as aforesaid.

Arthur A. Brown appeared before us as attorney for the claimant, together with Harrison T. Slosson, as counsel, and we recommend that the sum of one hundred and fifteen dollars (\$115.00) be allowed for counsel fees, and the sum of sixty-five dollars (\$65.00) for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 256.

Ann E. Bogart and Emma F. Bogart are the owners of said real estate, on which there is no mortgage.

The amount ascertained and determined by us to be paid to the owners of said real estate for the acquisition of the fee of the premises designated on said map as Parcel No. 256, and for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of one thousand seven hundred dollars (\$1,700.00) and the said Ann E. Bogart and Emma F. Bogart are entitled to be paid the same.

Arthur A. Brown appeared before us as the attorney for the owners, together with Harrison T. Slosson, as counsel, and we recommend that the sum of eighty-five dollars (\$85.00) be allowed for counsel fees and sixty-five dollars (\$65.00) for expenses and disbursements, including reasonable compensation for witnesses' fees.

130

Parcel No. 267.

William Hughes is the owner of this real estate, on which there is no mortgage.

The amount ascertained and determined by us to be paid to the owner of said real estate for the acquisition of the fee of the premises

designated on said map as Parcel No. 267, and for all damages sustained or which may be sustained by him by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of one hundred dollars (\$100.00) and the person entitled to be paid the same is the said William Hughes, owner as aforesaid.

Arthur A. Brown appeared before us as attorney and Harrison T. Slosson, of counsel, for said Hughes, and we recommend that the sum of five dollars (\$5.00) be allowed for counsel fees, and sixty-five dollars (\$65.00) for expenses and disbursements, including reasonable compensation for witnesses.

All of which is respectfully submitted.

Dated, Jan. 3rd, 1908.

EDGAR L. FURSMAN,
EDWARD H. NICOLL,
CHARLES B. COX.

131 *Objections to Report.*

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts Amendatory Thereof, in the Towns of Olive, Hurley and Marbletown, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the use of the City of New York.

Section No. 6. Parcel No. 246. Ashokan Reservoir.

James P. McGovern, the owner and claimant for parcel No. 246, excepts to the report of Hon. Edgar L. Fursman, Edward H. Nicoll and Charles B. Cox, Commissioners of Appraisal herein, and objects to the confirmation of the said report on the following grounds.

1. That the award of \$3300 made by the said Commissioners of

Appraisal for this property, is grossly inadequate.

132 2. That the Commissioners proceeded on an erroneous theory in valuing the said property, and excluded and did not consider in making their award, proper and material evidence bearing on the market value of this property which the claimant offered to introduce which would show that this property was a part of a natural reservoir site, and its market value by reason of this fact was much enhanced.

3. That the Commissioners erred in refusing to receive and consider evidence offered by the claimant to show the market value of this property as a part of a reservoir site.

4. That the Commissioners adopted an erroneous theory of damages in valuing this property, in that they refused to consider its

chief element of value, to wit, that the property was a part of a natural reservoir site.

4a. That the Commissioners erred in refusing to receive and consider the evidence showing the availability and adaptability of this parcel for reservoir purposes.

5. That by the erroneous theory of valuation adopted by the Commissioners, claimant has been deprived of his property, without due process of law and without just compensation, in violation of the United States Constitution.

6. That by the erroneous theory of valuation adopted by the Commissioners, claimant has been deprived of his property without due process of law and without just compensation in violation of the Constitution of the State of New York.

7. That the Commissioners erred in failing to make compensation to the claimant for the rights he had to combine with the owners of those contiguous parcels of land which together constituted a reservoir site, in offering for sale, using, or selling the whole of the said site to intending purchasers in the open market, and in thereby obtaining a greatly enhanced value for his property, and also for the rights which he had of combining with the said owners, in building or causing to be constructed a reservoir or reservoirs on all or parts of the said property, including this parcel of land, which rights were taken away by Chapter 724 of the laws of 1905, and the acts amendatory thereof and supplemental thereto, and particularly by Section 3 of the said act, and by other provisions of the said laws.

8. That the Commissioners erred in refusing to receive and consider evidence which was offered to show the most advantageous use to which this property could be put, and the said Commissioners, in making their award, did not take into consideration, the most advantageous uses to which this property could be put.

9. That the Commissioners erred in refusing to receive evidence to show the value of this property to the City of New York, as under chapter 724 of the laws of 1905 and the acts amendatory thereof, every other person and corporation was prohibited from constructing a reservoir on the Ashokan Reservoir site, or which this particular parcel of property was a necessary part, and the said Commissioners erred in refusing to consider the aforesaid evidence in making their award.

10. That the Commissioners erred in refusing to receive and consider evidence of the structural value of the buildings erected upon this parcel.

11. That the Commissioners erred in failing to award damages for the part of the property of which parcel No. 246 is a part, which was not taken by the City of New York.

12. That the Commissioners erred in failing to allow to the claimant, costs before and after notice of trial, and a trial fee, as the City made no offer to purchase this property.

13. That if the Commissioners of Appraisal properly construed the act in refusing to permit costs before and after notice of trial and a trial fee, the act under which these proceedings were carried

on, is unconstitutional in that regard, in that it violates Article 1, Section 1, and article 1, Section 6, of the Constitution of that State of New York, and Article 1 of the 14th amendment of the Constitution of the United States, in that it denies to this claimant, the equal protection of the laws, and deprives claimant of his property without due process of law and without just compensation, and is also in violation of Article 3, Section 16 of the Constitution of the State of New York, in that this is a local act, and embraces more than one subject, and these subjects are not expressed in the title.

14. That the Commissioners erred in failing to allow this claimant for the subpoena fee and mileage paid to J. Waldo Smith, and the subpoena fee and mileage paid to Charles H. Chadwick, amounting to \$9 each.

15. That the words "just and equitable compensation" as used in the act under which this proceeding was instituted, mean all loss, damage or expense direct or consequential suffered by the claimant, and the Commissioners erred in refusing to so construe the said act.

16. That if the words "just and equitable compensation" do not include all loss, damage or expense direct or consequential, suffered by the claimant, the act under which these proceedings are carried

135 on, is unconstitutional, and violates Article 1, Section 1, and Article 1, Section 6, of the Constitution of the State of New York, in that it deprives this claimant of the equal protection of the laws, and deprives him of the rights and privileges secured to railroad corporations under Section 13 of the act under which this proceeding is being carried on, and deprives claimant of his property without due process of law, and without just compensation, and also violates Article 1 of the 14th amendment of the Constitution of the United States, for the same reason.

Wherefore, claimant asks that the award herein may be set aside, and that the court may refuse to confirm the report of the said Commissioners, and that the same may be sent back to the same or other Commissioners.

JEROME H. BUCK,
Attorney for Claimant.

O. & P. O. Address, 299 Broadway, Borough of Manhattan, City of New York.

136 *Order of Confirmation, Being Order Appealed From.*

At a Special Term of the Supreme Court, Held in and for the County of Ulster, Third Judicial District, at the Court House, in the City of Kingston, in said County, on the 15th Day of February, 1908.

Present: Hon. James A. Betts, Justice.

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905, and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir. Section No. 6. Ulster County. Order Confirming First Separate Report.

On reading and filing the report dated January 3rd, 1908,
137 of Edgar L. Fursman, Edward H. Nicoll and Charles B. Cox, who were appointed commissioners in the above entitled matter by an order of the Supreme Court, dated June 29th, 1907, to estimate, ascertain and appraise the compensation to be made to the owners of and all persons interested in the real estate shown on the map in this proceeding, filed in office of the Clerk of the County of Ulster, on the 8th day of May, 1907, as map Number One, as proposed to be taken, acquired or affected for the purposes indicated in Chapter 724 of the Laws of 1905, and the acts amendatory thereof, and to exercise and discharge all the powers and duties conferred on such commissioners by said acts, and without unnecessary delay to ascertain and determine the compensation which ought justly to be made by the City of New York, to the owners or persons interested in the real estate, or any right, title, interest, term, easement, or privilege pertaining thereto, sought to be acquired, affected or extinguished by this proceeding, and to any owner or person interested in the real estate contiguous or adjacent thereto, in any way affected by the taking of such real estate, or the taking or extinguishment of any interest therein, whether such adjacent or contiguous real estate is shown on said map or not;

On reading due proof of the publication of the notice of filing of said report, together with notice of the presentation of such report for confirmation to this court, at a Special Term to be held in and for the Third Judicial District at the Court House, in the City of Kingston, Ulster County, New York, February 15th, 1908; and on reading and filing full proof of service of such report and notice of filing on the corporation counsel and the comptroller, of the City of New York.

And it appearing from said report, that on the 22nd day of July, 1907, the commissioners took and subscribed the oath required by the Constitution, and that the first meeting of said commission was held at the Court House, in the City of Kingston, on the 22nd day of July, 1907, at 11 o'clock in the forenoon, as directed by the order of the court;

That on the 22nd day of July, 1907, the oaths of the commissioners were filed in the office of the County Clerk of the County of Ulster, and a certified copy thereof filed with the Clerk of the County of New York, on the 23rd day of July, 1907;

That they viewed the real estate laid down on the aforesaid map, including the parcels embraced in said report, and carefully examined each parcel shown thereon, and thereafter heard the testimony and carefully considered and examined the claims presented to them, and which are reported on in said report, and considered proofs and allegations of the persons claiming to be entitled to or interested in so much of the real estate laid down on said map as so reported on, and such proofs and allegations as were offered on behalf of the City of New York;

That the testimony taken was filed with their report and that they have annexed thereto a true copy of so much of said map as shows the parcels so reported on;

That after hearing such claims, proofs and allegations and testimony, and making said views and examinations, and carefully considering the same; they did, all being present, and without unnecessary delay ascertain and determine the compensation which ought justly to be made by the City of New York, to the owners of or persons interested in so much as is included in said report, of the real estate sought to be acquired or affected by said proceedings, and after hearing John J. Linson, counsel for the petitioner, in favor of the confirmation of said report, and Mr. Harrison T. Slosson of counsel for the claimants to Parcels Nos. 224, 226, 228, 230, 237, 247, 249, 250, 253, 256 and 267, who presented objections (which are read and filed) on behalf of said claimants to Parcels Nos. 224,

226, 230 and 247, in opposition to confirmation as far as said report affects Parcels Nos. 224, 226, 230 and 247; and Mr.

Jerome H. Buck, of counsel for claimant to Parcel No. 246, who presented objections (which are read and filed) on behalf of said claimant, in opposition to confirmation as far as said report affects said parcel; and no one else appearing in opposition to the confirmation of said report; and due deliberation having been had hereon,

Now on motion of Francis Key Pendleton Corporation Counsel of the City of New York, the petitioner, it is

Ordered, that said report of said commissioners, dated January 1st, 1908, filed in the office of the Clerk of the County of Ulster on the 3rd day of January, 1908, be and the same hereby is in all respects ratified, approved and confirmed, and it is further

Ordered, That the respective amounts of compensation ascertained and determined by said Commissioners and fixed by their report as far as the same affects parcels numbers two hundred and twenty-

four (224), two hundred and twenty-six (226), two hundred and twenty-eight (228), two hundred and thirty (230), two hundred and thirty-seven (237), two hundred and forty-six (246), two hundred and forty-seven (247), two hundred and forty-nine (249), two hundred and fifty (250), two hundred and fifty-three (253), two hundred and fifty-six (256), and two hundred and sixty-seven (267), be paid by the Comptroller of the City of New York, with interest thereon as provided by law, to the persons respectively entitled thereto, and it is further

Ordered, that in any and all cases where the name or names of the owner or owners, person or persons interested in any real estate included in said report, shall not be set forth or mentioned, or where the said owner or owners, person or persons, owning such parcels of real estate are unknown, or are not fully known, and where there are adverse or conflicting claims to the amounts awarded, as set forth in said report, the said Comptroller of the City of New York, 140 shall pay the sum so mentioned in said report, payable to said owner or owners, person or persons, with such interest as aforesaid, into the Farmer's Loan and Trust Company, New York City, to the credit of such parcel and subject to the further order of this court.

A brief description of said several parcels here reported on as taken or affected by these proceedings, the respective amounts of compensation payable to the persons entitled to be paid such amounts of compensation, so far as the same are known, being as follows:

Parcel No. 224.

William and Ernestina Urban, Claimants.

All that certain piece or parcel of real estate situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 224, which said parcel is described as follows:

Beginning at the southeast corner of parcel No. 223, in the line between the towns of Olive and Hurley, and running thence along the easterly line of said parcel, N. 40 degrees 31 minutes E. 1,552.8 feet, crossing a road leading from Brown's Station to Ashton to the northeast corner of said Parcel No. 223, in the southerly line of Parcel No. 227; thence along the said southerly line, S. 52 degrees 33 minutes E. 711 feet to the northwest corner of Parcel No. 225, in the westerly line of a road leading from Stone Church and Brown's Station to Ashton; thence along the said westerly line and the westerly line of said parcel, S. 37 degrees 11 minutes W. 796.7 feet and S. 35 degrees 50 minutes W. 722.5 feet, recrossing before mentioned road leading from Brown's Station to Ashton at its junction with said westerly line, to the southwest corner of said Parcel No.

225, in the line between the towns of Hurley and Marble- 141 town; thence along the said town line and partly along the before mentioned line between the towns of Hurley and Olive, N. 53 degrees 22 minutes W. 619.5 feet and N. 53 degrees

7 minutes W. 197.8 feet to the point or place of beginning; containing 26.590 acres.

Parcel No. 226.

William and Ernestina Urban, Claimants.

All that certain piece or parcel of real estate, situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 226, which said parcel is described as follows:

Beginning at a point in the line between the towns of Hurley and Marbletown, said point being also the southeast corner of Parcel No. 225, in the easterly line of a road leading from Stone Church and Brown's Station to Ashton, and running thence along the easterly lines of said parcel and said road, N. 35 degrees 49 minutes E. 722.3 feet, N. 37 degrees 11 minutes E. 796.7 feet to the northeast corner of said parcel in the southerly line of parcel No. 227; thence along the said southerly line, S. 52 degrees 33 minutes E. 517 feet to the southeast corner of said parcel; thence S. 35 degrees 50 minutes W. 1,501 feet to a point in the before mentioned line between the towns of Hurley and Marbletown; thence along the said town line, N. 53 degrees 15 minutes W. 1,295 feet and N. 3 degrees 22 minutes W. 240 feet to the point or place of beginning; containing 53.022 acres.

The owners of said parcels are William Urban and Ernestina Urban.

There is a mortgage of two hundred and fifty dollars (\$250) existing thereon, executed to Magdalena Barber and assigned to Lilius L. Cooper. Interest thereon is due from July 1st, 1907.

12 The amount ascertained and determined as aforesaid, to be paid to the owners of and the persons interested in said land for the acquisition of the fee of the premises designated on said map as Parcels Nos. 224 and 226, and for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of four thousand five hundred dollars (\$4,500). William Urban and Ernestina Urban are entitled to be paid the said sum of four thousand five hundred dollars, subject however, to said mortgage of two hundred and fifty dollars (\$250.00) to Lilius L. Cooper, with interest thereon.

Parcel No. 228.

Frederick Hales, Sr., Claimant.

All that certain piece or parcel of real estate, situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 228, which said parcel is described as follows:

Beginning at the southeast corner of Parcel No. 229, said point so being the northeast corner of Parcel No. 227; thence S. 34 de-

grees 12 minutes W. 586.6 feet and N. 54 degrees 04 minutes W. 39.9 feet to a point in the easterly line of Parcel No. 227; thence along the said easterly line, N. 38 degrees 11 minutes 15 seconds E. 568.9 feet to the point or place of beginning; containing 0.264 acre.

Frederick Hales, Sr., is the owner of said real estate.

There is a mortgage now existing thereon, made by David Hogan to the United States Loan Commission, for three hundred and fifty dollars (\$350.00), on which there is now due the sum of seventy-three dollars (\$73.00) with interest from October 1st, 1907, at five per cent.

143 The amount ascertained and determined to be paid to the owners of and persons interested in said lands for the acquisition of the fee of the premises designated on said map as Parcel 228, and for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of said fee, for the purposes indicated in said Act, is the sum of seventy-five dollars (\$75.00).

The persons entitled to be paid the said sum *are* the owner above named, Frederick Hales, Sr., subject to the interest of the United States Loan Commissioners by reason of the mortgage aforesaid.

Parcel No. 230.

Stephen L. Angevine, Claimant.

All that certain piece or parcel of real estate, situated in the town of Hurley, County of Ulster, and State of New York, designated on the map hereinbefore referred to as Parcel No. 230, which said parcel is described as follows:

Beginning at the most northerly point of Parcel No. 227, in the Southerly property line of the Ulster & Delaware Railroad Company, and running thence along the said property line, N. 52 degrees 28 minutes E. 770 feet to the most westerly point of Parcel No. 231; thence along the southerly line of said parcel S. 49 degrees 07 minutes E. 302.1 feet to a point in Beaverkill, and S. 45 degrees 46 minutes E. 637.6 feet to the southeast corner of said parcel, in the southerly line of Parcel No. 229; thence along the said southerly line, S. 45 degrees 46 minutes E. 676.6 feet and S. 52 degrees 48 minutes E. 1,268 feet, crossing a road leading from Stone Church and Brown's Station to Ashton, and S. 39 degrees 51 minutes W. 652 feet to a point in the northerly line of before mentioned

Parcel No. 227; thence along the said northerly line N. 51 degrees 02 minutes W. 3,047.9 feet, recrossing the before mentioned road and the before mentioned Beaverkill to the point or place of beginning; containing 45.373 acres.

Stephen L. Angevine is the owner of said real estate.

There are no encumbrances thereon.

The amount ascertained and determined to be paid to him as the owner thereof, for the acquisition of the fee of the premises designated on said map as Parcel No. 230, and for all damages sustained or which may be sustained by him by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said act,

is the sum of one thousand nine hundred and fifty dollars (\$1,950.00).

The person entitled to be paid the said sum is the owner above named.

Parcel No. 237.

Frederick Hales, Sr., Claimant.

All that certain piece or parcel of real estate situated in the Town of Hurley, County of Ulster, and State of New York, designated on the map hereinbefore referred to as Parcel No. 237, which said parcel is described as follows:

Beginning at the southeast corner of Parcel No. 236, in the center of Beaverkill, and running thence along the easterly line of said parcel, and the centre line of said Kill, the following courses and distances; N. 23 degrees 16 minutes E. 124.1 feet, N. 7 degrees 51 minutes W. 87.8 feet, N. 12 degrees 10 minutes E. 104.3 feet and N. 73 degrees 27 minutes E. 38.6 feet to a point in the southerly line of Parcel No. 239; thence along the said southerly line the following courses and distances; S. 50 degrees 36 minutes E. 183.5 feet, S. 36 degrees 00 minutes west 566.2 feet, S. 47 degrees 57 minutes 145 40 seconds E. 1,558 feet, S. 58 degrees 43 minutes W. 110 feet and S. 26 degrees 57 minutes E. 426.6 feet to a point in the center of a road leading from Stone Church and Brown's Station to Ashton; thence along the center line of said road and still continuing along the southerly line of said parcel the following courses and distances; N. 78 degrees 05 minutes E. 209.8 feet N. 58 degrees 44 minutes E. 125.1 feet, N. 55 degrees 37 minutes E. 218.3 feet and N. 60 degrees 53 minutes E. 280.8 feet to the northwest corner of Parcel No. 238; thence along the westerly line of said parcel, S. 36 degrees 31 minutes E. 118.3 feet to a point in the northerly line of Parcel No. 232; thence along the said northerly line the following courses and distances; S. 84 degrees 52 minutes W. 108.4 feet, S. 61 degrees 59 minutes W. 400.6 feet S. 43 degrees 27 minutes W. 211 feet, S. 15 degrees 35 minutes W. 73 feet, S. 36 degrees 26 minutes W. 109.3 —, S. 55 degrees 51 minutes W. 51.1 feet, S. 80 degrees 09 minutes W. 339.8 feet, S. 50 degrees 47 minutes W. 198.8 feet, S. 58 degrees 20 minutes W. 104 feet and N. 51 degrees 16 minutes W 40.8 feet to a point in the easterly line of Parcel No. 233, in a road leading from Stone Church to Ashton, thence along the said road and the easterly line of said parcel, N. 44 degrees 03 minutes E. 236.6 feet, N. 42 degrees 10 minutes E. 217.2 feet and N. 39 degrees 31 minutes E. 108 feet to the northeast corner of said parcel No. 233; thence along the northerly line of same, N. 47 degrees 58 minutes W. 2,309.5 feet, recrossing the before mentioned road leading from Stone Church and Brown's Station to Ashton, to a point in the centre of the before mentioned Beaverkill in the easterly line of Parcel No. 234; thence along the said line and the centre line of said Kill the following courses and distances; S. 88 degrees 37 minutes east 161.6 feet, N. 34 degrees 59 minutes E.

36.6 feet, N. 70 degrees 31 minutes E. 69 feet, S. 67 degrees 146 37 minutes E. 73.5 feet and N. 51 degrees 01 minutes E.

108.1 feet to a point in the southerly line of parcel 235, thence along the southerly and easterly lines of said parcel, and still continuing along the center of said Kill, the following courses and distances; S. 54 degrees 10 minutes E. 66.6 feet, N. 55 degrees 47 minutes E. 60.5 feet, N. 13 degrees 10 minutes E. 127.3 feet and N. 74 degrees 27 minutes E. 182.7 feet to the point or place of beginning; containing 25.040 acres.

Frederick Hales, Sr., is the owner of said parcel.

Sarah Bogart is the owner of a mortgage executed by Frederick Hales and wife, on March 18th, 1884, and recorded in said Clerk's Office in Book 169 at page 534, on which there is due the sum of one thousand one hundred and fifty dollars (\$1,150.00), with interest from April 1st 1907, at six per cent.

There is also a mortgage dated January 7th, 1882, covering part of parcel 237, on which there is due one hundred and fifty dollars (\$150.00), with interest for two years at six per cent. This mortgage was made, and seems by the testimony to be held and owned by Charlotte Markel, and recorded in Ulster County Clerk's Office, in Book 158 at page 378.

The amount ascertained and determined to be paid to the owners of and persons interested in said land for the acquisition of the fee of the premises designated on said map as Parcel No. 237, and for all damages sustained or which may be sustained by them by reason of the acquisition; use and occupation of the said fee for the purposes indicated in said Act, is the sum of five thousand three hundred and fifty dollars (\$5,350.00).

The persons entitled to be paid the said sum of five thousand three hundred and fifty dollars (\$5,350.00) are Frederick Hales, Sr., owner, subject to the interest of the several mortgages above named.

147

Parcel No. 246.

James P. McGovern, Claimant.

All that certain piece or parcel of real estate situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 246, which said parcel is described as follows:

Beginning at the northeast corner of Parcel No. 241, in in the southerly line of Parcel No. 251, at the intersection of the center lines of the Ulster & Delaware Plank Road and a road leading from Brown's Station to said Plank Road, and running thence along the said southerly line and the center line of said Plank Road, N. 83 degrees 13 minutes E. 101.3 feet and N. 78 degrees 57 minutes E. 51.5 feet to the southwest corner of Parcel No. 252; thence along the southerly line of said parcel and still continuing along the center line of said Plank Road, N. 78 degrees 57 minutes E. 40.4 feet and N. 67 degrees 41 minutes E. 174 feet to the northwest corner of Parcel No. 253; thence along the westerly line of said parcel, S. 41

degrees 38 minutes E. 648.7 feet to the southwest corner of same; thence along the southerly line of said parcel, N. 67 degrees 20 minutes E. 272.7 feet to the southeast corner of same, in the westerly line of Parcel No. 254; thence along the said westerly line, S. 41 degrees 39 minutes E. 1,747 feet to the most southerly point of said parcel; thence on a curve of 2,550 feet radius to the right 102.4 feet, S. 39 degrees 46 minutes W. 236.6 feet on a curve of 461.9 feet radius to the left 123.1 feet to the most easterly point of Parcel No. 269; thence along the easterly line of said parcel, N. 44 degrees 32 minutes W. 1,010 feet to the northeast corner of same; thence along the northerly line of said parcel, S. 50 degrees 53 minutes W. 254.7 feet to the northwest corner of same; thence along the westerly line of said parcel, S. 43 degrees 48 minutes E. 1,084 feet to the most southerly point of same; thence on a curve of 450 feet radius to the right 150.5 feet and S. 17 degrees 17 minutes W. 354.4 feet to the southeast corner of Parcel No. 245; thence along the easterly line of said parcel N. 44 degrees 06 minutes W. 1,906 feet to the southeast corner of Parcel No. 247; thence along the easterly line of said parcel N. 44 degrees 06 minutes W. 113 feet to the most northerly point of said parcel, in the easterly line of before mentioned parcel No. 241, said point being in the center of before mentioned road leading from Brown's Station to the Ulster & Delaware Plank Road; thence along the center line of said road and the said easterly line, the following courses and distances; N. 19 degrees 30 minutes E. 73.7 feet, N. 5 degrees 02 minutes E. 288.9 feet, N. 5 degrees 17 minutes E. 430.4 feet and N. 10 degrees 56 minutes east 128 feet to the point or place of beginning; containing 60.459 acres.

James P. McGovern, is the owner of this parcel.

There is a mortgage thereon held and owned by the Home Seekers' Co-operative Savings and Loan Association on which there is due the sum of two hundred and ninety-six dollars and fifty-four cents (\$296.54), with interest from Nov. 1st, 1907.

The amount ascertained and determined as aforesaid, to be paid to the owners of and persons interested in the said land for the acquisition of the fees of the premises designated on said map as Parcel No. 246, and for all damages sustained or which may be sustained by them by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of three thousand three hundred dollars (\$3,300.00).

The persons entitled to be paid the said sum of three thousand three hundred dollars (\$3,300.00) are James P. McGovern, subject to the interest of the Home Seekers' Co-operative Savings and Loan

Association, owner of the mortgage above named. The amount of said mortgage to wit, two hundred and ninety-six dollars and fifty-four cents (\$296.54) with interest from November 1st, 1907, is payable to the Home Seekers' Co-operative Savings and Loan Association.

Parcel No. 247.

William Markle, Sole Trustee of School District No. 2, Town of Hurley, Claimant.

All that certain piece or parcel of real estate situated in the Town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel Number 247, which said parcel is described as follows:

Beginning at a point in the center of a road leading from Stone Church and Brown's Station to Ashton, said point being in the southerly line of Parcel No. 241, and running thence along the said southerly line and the center of said road, N. 58 degrees 31 minutes E. 55 feet and N. 49 degrees 36 minutes E. 127.7 feet to the southeast corner of said parcel, thence along the easterly line of same and still continuing along the center line of said road, N. 19 degrees 30 minutes E. 22.3 feet to a point in the westerly line of Parcel No. 246; thence along the said line S. 44 degrees 06 minutes E. 113 feet to the northeast corner of Parcel No. 245; thence along the northerly line of said parcel S. 57 degrees 06 minutes W. 96.5 feet and N. 89 degrees 37 minutes W. 149.2 feet to the point or place of beginning; containing 0.314 acre.

School District Number Two, in the town of Hurley, William Markle, sole trustee, is the owner of this parcel.

The amount ascertained and determined to be paid to the Trustee of School District Number Two, above named for the acquisition of the fee of the premises designated on said map as Parcel No. 247, and for all damages sustained or which may be sustained by said School District or by said Markle, as Sole Trustee, by reason of the acquisition, use and occupancy of the said fee for the purposes indicated in said Act, is the sum of seven hundred dollars (\$700.00).

The person entitled to be paid the said sum of seven hundred dollars (\$700.00) is William Markle, as Sole Trustee of School District Number Two.

Parcel No. 249.

Richard Hogan, Claimant.

All that certain piece or parcel of real estate situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 249, which said parcel is described as follows: Beginning at the northeast corner of Parcel No. 248 in the southerly property line of the Ulster & Delaware Railroad Company, said point being also in the center of the Ulster & Delaware Plank Road, and running thence along the center line of said road and the said southerly property line, S. 67 degrees 44 minutes E. 28.9 feet to the most westerly point of Parcel No. 251; thence along the southerly line of said parcel and continuing along the center line of said Plank Road, S. 67 degrees 44 minutes E. 50.6 feet to the northwest corner of Parcel No. 250; thence along the westerly line of said parcel S. 33 degrees 13 minutes W. 202.4

feet to a point in the northerly line of Parcel No. 241; thence along the said line, N. 53 degrees 27 minutes W. 70 feet to the southeast corner of before mentioned Parcel No. 248; thence along the easterly line of said parcel, N. 30 degrees 39 minutes E. 183.6 feet to the point or place of beginning; containing 0.328 acre.

Richard Hogan is the owner of this Parcel.

151 There are no encumbrances thereon.

The amount ascertained and determined to be paid to the owners thereof for the acquisition of the fee of the premises designated on said map as Parcel No. 249, and for all damages sustained or which may be sustained by him by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of one thousand eight hundred dollars (\$1,800.00).

Parcel No. 250.

Franklin O. Van Velsen, Claimant.

All that certain piece or parcel of real estate situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 250, which said parcel is described as follows:

Beginning at the northeast corner of Parcel No. 249, in the center of the Ulster & Delaware Plank Road, and running thence along the center line of said road, and the southerly line of Parcel No. 251, S. 67 degrees 44 minutes E. 218.7 feet to a point in the northerly line of Parcel No. 251; thence along the said northerly line, S. 30 degrees 19 minutes west 296.2 feet, N. 67 degrees 25 minutes W. 233.8 feet and N. 33 degrees 13 minutes E. 95 feet to the southeast corner of Parcel No. 249; thence along the easterly line of said Parcel N. 33 degrees 13 minutes E. 202.4 feet to the point or place of beginning; containing 1,521 acres.

Franklin O. Van Velsen, is the owner of said real estate.

There is a mortgage thereon held and owned by the Home Seekers' Co-operative Savings and Loan Association recorded in

152 Book 384 at page 347, on which there is, due the sum of one hundred sixty-three dollars and ten cents (\$163.10), with interest from November 11th, 1907.

The amount ascertained and determined to be paid to the owner of and persons interested in the said land for the acquisition of the fee of the premises designated on said map as Parcel No. 250, and for all damages sustained by them or which may be sustained by them, by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of two thousand two hundred dollars (\$2,200.00).

The persons entitled to be paid the sum of two thousand two hundred dollars (\$2,200.00) are Franklin O. Van Velsen, owner, subject to the interest of the Home Seekers' Co-operative Savings and Loan Association to the amount of one hundred sixty-three dollars and ten cents (\$163.10) with interest from November 11th, 1907, as above set forth.

Parcel No. 253.

Daniel McAuliffe and Timothy McAuliffe, Claimants.

All that certain piece or parcel of real estate situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 253, which said parcel is described as follows:

Beginning at a point in the center of the Ulster & Delaware Plank Road, at the northeast corner of Parcel No. 246, said point also being in the southerly line of Parcel No. 252, and running thence along the said southerly line and the center line of said Plank Road, N. 67 degrees 41 minutes E. 273.1 feet to a point in the westerly line of Parcel No. 254; thence along the said westerly line, S. 41 degrees 39 minutes E. 647 feet to a point in the
153 easterly line of before mentioned Parcel No. 246; thence along the said line, S. 67 degrees 20 minutes W. 272.7 feet and N. 41 degrees 38 minutes W. 648.7 feet to the point or place of beginning; containing 3.834 acres.

Daniel McAuliffe and Timothy McAuliffe are the owners of said parcel, on which there is no mortgage.

The amount ascertained and determined to be paid to the said owners for the acquisition of the fee of the premises designated on said map as Parcel No. 253, is the sum of two thousand three hundred dollars (\$2,300.00).

The persons entitled to be paid the said sum of two thousand three hundred dollars (\$2,300.00) are said Daniel McAuliffe and Timothy McAuliffe, owners as aforesaid.

Parcel No. 256.

Ann E. Bogart, Claimant.

All that certain piece or parcel of real estate situated in the town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 256, which said parcel is described as follows:

Beginning at a point in the center of the Ulster & Delaware Plank Road, at the southwest corner of Parcel No. 257, and running thence along the center line of said road and the northerly line of Parcel No. 254, S. 63 degrees 58 minutes W. 176.7 feet; thence still continuing along the northerly line of said Parcel No. 254, N. 28 degrees 41 minutes W. 156.6 feet and N. 57 degrees 14 minutes E. 139.6 feet to a point in the westerly line of before mentioned Parcel No. 257; thence along the said line, S. 40 degrees 11 minutes E. 178.3 feet to a point or place of beginning; containing
178.3 feet to a point or place of beginning; containing 0.600
acre.

154 Ann E. Bogart, is the owner of said real estate, on which there is no mortgage.

The amount ascertained and determined to be paid to the owners of said real estate for the acquisition of the fee of the premises designated on said map as Parcel No. 256, and for all damages sustained

or which may be sustained by *them* by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of one thousand seven hundred dollars (\$1,700.00) and the said Ann E. Bogart is entitled to be paid the same.

Parcel No. 267.

William Hughes, Claimant.

All that certain piece or parcel of real estate situated in the Town of Hurley, County of Ulster and State of New York, designated on the map hereinbefore referred to as Parcel No. 267, which said parcel is described as follows:

Beginning at the southeast corner of Parcel No. 266, in the centre of the Ulster & Delaware Plank Road, said point also being in the easterly line of Parcel No. 268, and running thence along the said line, S. 46 degrees 48 minutes E. 156.5 feet to a point in the easterly line of Parcel No. 265; thence along the said line S. 35 degrees 17 minutes W. 42.8 feet and N. 44 degrees 14 minutes W. 168 feet to the northwest corner of said parcel, in the centre of before mentioned Plank Road; thence along the center line of said road and along the southerly line of before mentioned Parcel No. 266, N. 52 degrees 14 minutes, E. 35.2 feet to the point or place of beginning; containing .144 acre.

William Hughes is the owner of said real estate.

The amount ascertained and determined to be paid to the owner of said real estate for the acquisition of the fee of the premises designated on said map as Parcel No. 267, and for all damages sustained or which may be sustained by him by reason of the acquisition, use and occupation of the said fee for the purposes indicated in said Act, is the sum of one hundred dollars (\$100.00), and the person entitled to be paid the same is the said William Hughes, owner as aforesaid.

Parcel Nos. 224 & 226.

Arthur A. Brown, appeared as attorney and counsel for the owners, and the sum of Two hundred and twenty-five Dollars (\$225.00) is allowed him for counsel fees; and the further sum of Sixty-five Dollars (\$65.00) is allowed to said owners as and for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 228.

Arthur A. Brown, appeared as attorney and counsel for the owners, and the sum of Three dollars and seventy-five cents (\$3.75) is allowed him for counsel fees; and the further sum of Twenty dollars (\$20) is allowed to said owner for expenses and disbursements including reasonable compensation for witnesses.

Parcel No. 230.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of Ninety-seven dollars and fifty cents (\$97.50)

is allowed him for counsel fees; and the further sum of sixty-five dollars (\$65.00) is allowed to said owner for expenses and disbursements including reasonable compensation for witnesses.

156

Parcel No. 237.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of Two hundred and sixty-seven dollars and fifty cents (\$267.50) is allowed him for counsel fees; and the further sum of eighty-five dollars (\$85) is allowed to said owner for expenses and disbursements including reasonable compensation for witnesses.

Parcel No. 246.

Jerome H. Buck, appeared as attorney and counsel for the owner, and the sum of One hundred and sixty-five dollars (165) is allowed him for counsel fees; and the further sum of Eighty-four Dollars (\$84.00) is allowed to said owner for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 247.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of Thirty-five dollars (\$35.00) is allowed him for counsel fees; and the further sum of Sixty-five Dollars (\$65.00) is allowed to said owner for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 249.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of Ninety Dollars (\$90.00) is allowed him for counsel fees; and the further sum of Sixty-five Dollars (\$65.00) is allowed to said owner for expenses and disbursements, including reasonable compensation for witnesses.

157

Parcel No. 250.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of One hundred and ten dollars (110) is allowed him for counsel fees; and the further sum of Sixty-five Dollars (\$65.00) is allowed to said owner for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 253.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of One hundred and fifteen dollars (\$115) is allowed him for counsel fees; and the further sum of Sixty-five Dollars (\$65.00) is allowed to said owner for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 256.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of Eighty-five dollars (\$85.00) is allowed him for counsel fees; and the further sum of Sixty-five dollars (\$65.00) is allowed to said owner for expenses and disbursements, including reasonable compensation for witnesses.

Parcel No. 267.

Arthur A. Brown, appeared as attorney and counsel for the owner, and the sum of Five Dollars (\$5.00) is allowed him for counsel fees; and the further sum of Sixty-five Dollars (\$65.00) is allowed to said owner for expenses and disbursements, including reasonable compensation for witnesses.

Enter,

JAMES A. BETTS,
Justice Supreme Court.
JOHN D. FRATSHER, *Clerk.*

58

Stipulation as to Exhibits.

It is stipulated that the photographs introduced in evidence and marked Claimant's Exhibits J and K and Petitioner's Exhibits 1, 3, 4 and 5, and any maps referred to in the petition, report, order or testimony, need not be printed in the case, and that either party may submit the same to the court at the time of the argument,

It is further stipulated that the other exhibits being sufficiently described in the evidence need not be printed, and

It is further stipulated that the descriptions of various parcels of property other than parcel No. 246 printed in the petition and report of the Commissioners, not being necessary for the determination of this appeal, need not be printed.

Dated, New York, August —, 1908.

JEROME H. BUCK,
Attorney for Claimant-Appellant.
FRANCIS K. PENDLETON,
Attorney for Petitioner-Respondent.

9

Stipulation in Regard to Proceedings.

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply, etc.

It is stipulated, that notices of application for the Commissioners Appraisal herein, were duly given, and it is further

stipulated, that the Commissioners took and subscribed the oath required, on the 22nd day of July, 1907, and that the oaths of said

Commissioners, were duly filed in the office of the Clerk of the County of Ulster, on the said day, and a certified copy thereof was filed in the office of the Clerk of the County of New York, the 23rd day of July, 1907, and it is further

Stipulated, that notice of the motion to confirm the first separate report of the said Commissioners was duly given.

Dated, New York, July 31, 1908.

JEROME H. BUCK,

Attorney for Claimant-Appellant.

FRANCIS K. PENDLETON,

Attorney for Petitioner-Respondent.

160

Opinion of Betts, J.

New York Supreme Court, Third Judicial District, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate For and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Towns of Olive, Marletown and Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir. Section 6. Ulster County.

Ulster Special Term, February, 1908.

Francis K. Pendleton, corporation counsel, for motion; John J. Linson, counsel.

Jerome H. Buck, attorney for one claimant.

Arthur A. Brown, with Harrison T. Slosson of counsel, for various claimants.

161 BETTS, J.:

This is the first separate report upon 12 parcels of land by the commission in what is known as section number six, Ashokan Reservoir. No objections were made to the report of the commissioners in seven parcels and those awards were confirmed upon the hearing. The awards in five parcels, numbers 224, 226, 230, 246 and 247 were objected to and are before me for confirmation or otherwise.

The principal objection raised here in addition to certain similar objections to those which were passed upon by me in section number three in a decision handed down a few days ago relates to what is here called the structural value of the buildings or erections upon certain of those parcels of land in which the award is objected to. Upon the hearings in certain of these five cases evidence was offered as to the structural value of the buildings upon said parcels. Objec-

ion was made that such evidence was incompetent, as not being the true measure of value and objection sustained by the commission. The evidence proposed to be offered as I understand it was as to the cost price at the time of condemnation of the different materials composing the several buildings with such a discount therefrom as the expert builders would conclude was proper for the length of time that the building had been erected and to this cost of material was to be added the cost of labor, architect's fees and matters of that kind in connection with the building; so that practically the only question that I shall address myself to is as to whether such evidence is admissible and whether or not the commissioners erred in rejecting the same. "The owner is entitled, not simply to such sum as the property would bring at forced sale, or under peculiar circumstances, but to such sum as the property is worth in the market, that is, to persons generally, if those desiring to purchase were found, who were willing to pay its just and full value." * * * "The market value of the land is to be considered, and the jury should not consider the expenditures that may have been made upon the property. The expenditures may not have increased the value to the amount of the expenditures. Whether the expenditures which had been made upon the land were wise or unwise, whether coluntarily or compulsor-y made in order to abate a nuisance, the cost of such expenditures is not necessarily to be taken as additional value to the land as it would have been without such expenditures." Mills on Eminent Domain, 2nd Edition, Sec. 168. "In estimating the value of property taken for public use it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it." 2 Lewis on Eminent Domain, 2nd Edit., Sec. 478.

In Matter of Long Island Railroad Company, 6 N. Y. Supreme Court Reports (T. & C.) 298-299 it appears that the premises sought to be condemned were owned by one, Van Sise. Prior to the ownership of Van Sise and while one Stewart owned the property, the condemning party had gone into occupation of the property and had placed its track thereon. Van Sise claimed the railroad company was a trespasser and he sought compensation for land and the improvements the railroad company put on it and tried to prove the value of the rails, ties, etc., on the land in question which was refused by the commissioners. Held that the fixtures belonged to the owner, Van Sise, and that he should be permitted to make proof as the owner if the value of the premises taken including track, etc. "In making such proof we do not understand that the value of each tie and rail is to be determined; the railway track composed of rails and ties is a fixture of the land, and its value as a fixture enhancing the value of the land for the beneficial enjoyment thereof is the measure of compensation."

In the matter of the N. Y. W. S. & B. Railway Company to

acquire title to lands of Cornelia M. Gennet and others, 37
 163 Hun., 317, the railroad company had, without authority, entered upon and laid and constructed its tracks upon the lands sought to be condemned before instituting the condemnation proceeding. Held, "Any structure wrongfully placed upon the lands by the railway company became by that act a part of the land and entered into its value. The case tends to show that the railway company entered upon the lands in question without right or authority from the owners and built the road in part thereon. The property so put upon the land added to its value and was properly included in the appraisal as property of the land owners to be taken by the railroad company." * * * "The competency of evidence of the value of improvements put upon the premises has been considered. The condition of the premises when these proceedings were instituted was the proper subject of inquiry." * * * "The cost of structures put upon the land was not competent and such evidence was promptly rejected. The value of the land and structures thereon was alone to be determined. The cost is not a rule of damages."

In Village of St. Johnsville against Smith, 184 N. Y., 341, the village authorities had constructed upon the premises of the land owner, Smith, a certain intake, water pipes and other erections with relation to their proposed water works prior to the attempt to condemn the same and such work was upon the property when the application to take the property for village water works purposes was made. The condemnation commissioners did not take into consideration the intake basin, pipes and work placed upon the lands by the village in fixing compensation to the owner. Held this action was erroneous and that such improvements should have been taken into consideration. The court says: "The law affixes the consequences to the act, not the intent. It says to those who invoke the

power of eminent domain as well as to all others: If you invade land without legal right and place structures of a permanent character thereon, those structures belong to the landowner." * * * "In holding, as we do, that the appellant is entitled to have the improvements made upon his land by the respondent while a trespasser taken into consideration in ascertaining his compensation, it must be distinctly understood that the measure of such compensation is neither the cost of the improvements nor their value or the value of their use to the village. The true inquiry is how much do the improvements placed upon the property enhance the value of the appellant's land." The directions were to appoint new commissioners of appraisal to determine the appellant's compensation in accordance with the opinion.

The same rule is applied *in re* Trustees of the Village of White Plains, 108 N. Y., Supp. 596-599, January, 1908, where the commissioners of appraisal had not allowed as belonging to the land owner improvements which had been placed upon the land by the condemning party without the consent of the land owner. The court quoted from the decision in 184 N. Y., 341 (*supra*), as to the

rule of damages in that case, followed it and a new appraisal was ordered before new commissioners.

In the matter of the City of New York (Blackwell's Island Bridge), 118 App. Div., 272, was a case decided in the first department in 1907. The city of New York appealed from the order confirming the report of the commissioners of estimate and appraisal in condemnation proceedings on the ground that the awards were excessive. The Appellate Division reviewed certain of the assessments as compared with the recent sales of parcels on or near the same block in New York City, and said: "The comparison of the amounts awarded by the commissioners with the amounts paid in these five actual transactions out of a total of thirteen parcels, demonstrates that in allowing these excessive increases in the estimated value over the actual transactions, the commissioners must have proceeded upon some erroneous theory. An examination of the record discloses certain fundamental errors, the commission of which must have brought about the extraordinary results arrived at." * * * "In regard to a number of the parcels the commissioners erroneously allowed testimony as to the structural value of the buildings. I understand the rule is that a witness may testify as to the market value of the lot of land and the market value of the lot with the building thereon standing. In other words, testimony as to how much the market value of the lot is enhanced by the building standing thereon. What the structural value of the building is, is not competent. A man may purchase a piece of wild land far off from any railroad connection and thereon may build a magnificent structure. No development may take place in the neighborhood, and there may be no demand of any kind for the property. In considering the market value of the real estate under such circumstances, it would be obvious that what it had cost to put the building there could in no way affect the market value of the property as a whole." The order appealed from was reversed and the proceedings sent back to new commissioners to be appointed.

In the matter of the City of New York (Town of Carmel), 56 Misc., 311, the motion was made by the Corporation Counsel to set aside awards made by the commissioners upon the ground, first that the awards were excessive, second, that the commissioners proceeded upon an erroneous theory in estimating the value of the lands with buildings thereon, and in admitting improper and incompetent evidence respecting the cost and structural value of buildings upon the properties in question. The Court says: "In many instances, witnesses for the claimants were permitted to give the structural value, or cost of reproducing the buildings. For instance, with respect to Parcel No. 27, which was the first case tried, the witness Waite, who was a builder and contractor, and not a real estate expert, after describing the buildings, giving their dimensions, etc., was asked to give the value of the house at the time the petitioner took possession of the whole property, and, in answer, gave the sum of \$1,638.56, as the net total of the value of the house; and, on cross-examination, he stated that his estimate was based entirely

upon what it would cost to reproduce these buildings—the witness adding, “It is figured on what material and labor cost.” Several witnesses thus testified to the cost of reproduction of certain houses upon lands which were taken in this condemnation proceeding, a mason estimated the cost of reproducing the stone-work and a tin-smith would give the cost of reproducing the tinwork in buildings on parcels condemned over the objection of the Corporation Counsel. The Court says: The rule seems to be now very well settled that the measure of damage is neither the cost of the improvements at the time they were erected, nor their value, nor the present cost of reproducing them, but is, how much have the structures and erections upon the land increased and enhanced its value?” The motion to set aside the report as to parcels in which such evidence as to structural value was given was granted and new commissioners were ordered appointed.

The City of Syracuse vs. Stacey, 169 N. Y., 231-238, was an appeal by the land-owner, Stacey and others from the affirmance of a report of the Commissioners of appraisal in condemnation proceedings. The Commissioners had awarded damages to the landowners on the difference in the value of the premises affected with and without the water rights sought to be condemned. The following objection to the report of the commissioners was urged by the appellant, Skaneateles Paper Company and other land owners: “Assuming that the only compensation to which defendants are entitled is the difference in value of their affected property, with and without the rights condemned, or consequential damages, the commissioners erroneously refused to receive the evidence offered by defendants of the present value of the dams and other structures on their premises, for utilizing the water for power, and of the mill and other buildings, on their premises, or of the cost of reproducing those structures and buildings in their then condition, and also erroneously refused to receive the evidence offered by defendants of the net earnings or profits resulting from the operation of the properties for a number of preceding years.” The Court held that the difference in the value of the premises affected with and without the water rights affected a full compensation to the owners and the basis adopted by the commissioners for the determination of the damages sustained was correct.

The authorities all seem to be one way in this State which is that evidence of structural cost or value as offered in these cases and excluded by the commissioners on objection of the city is not admissible. The commissioners simply followed the law in making the decision that they did. All the other points raised by the land owners arise in these various parcels in practically the same way they arose before the commission in Section No. 3 and the memorandum handed down by the Court a few days ago in that section applies to this case in regard to the adaptability and availability for reservoir purposes. A much more extended offer was made by one of the claimants involving a great number of proposed offers to prove. The Court considered it as an entirety as one offer to prove and sustained the objection made by the City.

The award of the commissioners is confirmed in all respects.

168

Waiver of Certification.

It is stipulated, that the foregoing are true and correct copies of the petition, order for the appointment of Commissioners, the notice of claim, the testimony taken before the Commissioners of Appraisal on the condemnation of Parcel No. 246 in Section No. 6 of the Ashokan Reservoir, the report of the Commissioners of Appraisal; the claimant's bill of costs; the objections to the report; the order appealed from and the notice of appeal, and the opinion of Judge Betts, all of which papers are now on file in the office of the Clerk of the County of Ulster, and

It is further stipulated, that the appeal herein may be heard upon the foregoing papers without certification thereof, as required by Sections 3301 and 1315 of the Code of Civil Procedure, or by any other provisions of the Code of Civil Procedure, or the general rules of practice, certification being hereby waived.

Dated, New York, September 2nd, 1908.

JEROME H. BUCK,

Attorney for Appellant.

FRANCIS K. PENDLETON,

Attorney for Respondent.

169

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Appellate Division Court Rooms, in the City of Albany, on the 22nd day of January, 1909.

Present: Hon. Walter Lloyd Smith, Presiding Justice.

" Alden Chester,

" John M. Kellogg,

" Aaron V. S. Cochrane,

" Albert H. Sewell,

Associate Justices.

Supreme Court, Appellate Division, Third Department.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of — Pure and Wholesome Water for the Use of the City of New York.

Section No. 6, Parcel No. 246.

James P. McGovern, Claimant-Appellant.

The appeal of the claimant James P. McGovern from the order of the special term of this court confirming the First Separate Report of Hon. Edgar L. Fursman, Edward H. Nicoll and Charles B. Cox, commissioners of appraisal for Section No.

170

6, Ashokan Reservoir, which order of confirmation was filed in the office of the Clerk of the County of Ulster on the 17th day of April, 1908, and also from the appraisal and report of the aforesaid commissioners, and from each and every part of the said order, appraisal and report as far as the same affects parcel No. 246 in Section 6, except that part relating to a mortgage on the aforesaid parcel, having been brought on for argument at the November term of this Appellant Division, after hearing Mr. D. Cady Herrick and Mr. Edward A. Alexander, of counsel for the appellant, and Mr. John J. Linson and Mr. Howard Chipp, of counsel for the City of New York, respondent, due deliberation having been had thereon,

Now on motion of Francis K. Pendleton, Corporation Counsel of the City of New York,

It is unanimously ordered, that said order, appraisal and report appealed from be and the same hereby are in all things affirmed with costs to be taxed.

JOSEPH H. HOLLANDS, *Clerk*.

A copy.

JOSEPH H. HOLLANDS, *Clerk*.

JOHN D. FRATSHER, *Clerk*.

[Appellate Division Seal.]

171

Judgment of Affirmance.

Supreme Court, Appellate Division, Third Department.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Section No. 6, Parcel No. 246.

James P. McGovern, Claimant-Appellant.

The appeal of the claimant James P. McGovern from the order of the special term of this court confirming the First Separate Report of Hon. Edgar L. Fursman, Edward H. Nicoll and Charles B. Cox, commissioners of appraisal for Section No. 6, Ashokan Reservoir, which order of confirmation was filed in the office of the Clerk of the County of Ulster on the 17th day of April, 1908, and also

172 from the appraisal and report of the aforesaid commissioners, and from each and every part of the said order, appraisal and report as far as the same affects parcel No. 246 in Section No. 6, except that part relating to a mortgage on the aforesaid parcel, having been brought on for argument at the November term of this Appellate Division, after hearing Mr. D-Cady Herrick and Mr. Ed-

ward A. Alexander, of counsel for the appellant, and Mr. John J. Linson and Mr. Howard Chipp, of counsel for the City of New York, respondent, due deliberation having been had thereon,

Now on motion of Francis K. Pendleton, Corporation Counsel of the City of New York,

It is unanimously Ordered, that the said order, appraisal and report appealed from be and the same hereby are in all things affirmed with costs; and said costs having been taxed by the Clerk at the sum of One hundred and three dollars and five cents it is further

Ordered, that the respondent the City of New York recover of the appellant James P. McGovern, and that said appellant pay to said respondent the sum of One hundred and three dollars and five cents costs of this proceeding.

Dated, February 13th, 1909.

J. D. FRATSHER, Clerk.

173 *Notice of Appeal to Court of Appeals.*

New York Supreme Court, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Ashokan Reservoir. Parcel 246. Section 6.

James P. McGovern, Claimant-Appellant.

SIR: Please take notice that the claimant, James P. McGovern, of Parcel No. 246 in Section No. 6 of the Ashokan Reservoir, hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Judicial Department, affirming an order entered herein in the office of the Clerk of the County of

174 Ulster, on the 17th day of April, 1908, which said order of affirmance was entered in the office of the Clerk of the Appellate Division of the Supreme Court, Third Department, on the 22nd day of January, 1909, and a copy thereof in the office of the Clerk of the County of Ulster, on the 30th day of January, 1909, and the said claimant, James P. McGovern appeals from each and every part of the said order as well as from the whole thereof.

The claimant, James P. McGovern, also appeals to the said Court of Appeals, from the judgment of affirmance entered on the said order of affirmance, for the sum of \$103.05 which said judgment was entered in the office of the Clerk of the County of Ulster, on the 13th day of February, 1909, and the said claimant, James P. McGov-

ern, appeals from each and every part of the said judgment as well as from the whole thereof.

Dated, New York, February 17th, 1909.

Yours etc.,

JEROME H. BUCK,
Attorney for Claimant.

O. & P. O. Address, 165 Broadway, Borough of Manhattan, City of New York.

To Francis K. Pendleton, Esq., Corporation Counsel, County Clerk of Ulster County.

175 *Opinion of Appellate Division by Sewell, J.*

Supreme Court, Appellate Division, Third Department.

287/4.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate.

Argued November Term, 1908.

Decided January Term, 1909.

Appeal from a final order of the Supreme Court, confirming a report of the commissioners of appraisal for Section 6 in the Ashokan Reservoir filed and entered in the clerk's office of the County of Ulster, April 17, 1908, and from the appraisal and report of the commissioners.

Before:

Smith, Presiding Justice.

Chester, Kellogg, Cochrane, Sewell, Associate Justices.

D. Cady Herrick for appellant.

John J. Linson for respondent.

176 SEWELL, J.:

This proceeding was instituted under chapter 724 of the Laws of 1905, entitled "An act to provide for an additional supply of pure and wholesome water for the City of New York; and for the acquisition of lands or interest therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters and other appurtenances for that purpose; and for the appointment of a commission with the power and duties necessary and proper to attain these objects."

Section 12 of the act provides for the appointment of commissioners of appraisal and that it shall be their duty to view the real estate

and hear the proofs and allegations of the parties and other persons interested, and that they "shall without unnecessary delay, ascertain and determine the just and equitable compensation which ought to be made by the City of New York to the owners or the persons interested in the real estate sought to be acquired or affected by said proceedings."

The proceeding was commenced June 25, 1907, to acquire certain real estate in the town of Hurley, Ulster County, known as Parcel 16. The commissioners of appraisal were appointed June 29, 1907, and on the 6th day of November, 1907 they proceeded to hear the proofs and allegations of the parties. In their report dated January 1908, they stated that they had estimated and determined upon \$300.00 as the sum to be paid to the owners for the fee of the premises.

The principal question presented by this appeal, is whether the commissioners proceeded upon an erroneous principle in determining the amount that should be awarded to the owners. It is unnecessary to cite and comment upon the various cases, decided in the courts of this and other states, upon the subject of damages in proceedings of this character. It is sufficient to say that the rule is well established in this state, by an unbroken line of authority, that the owner is to receive the full value of the land taken, not its value to the owner or to the person or corporation seeking to acquire it, but the market value of the property, which means, the fair value as between one who wants to purchase and one who wants to sell. The landowner is not limited in compensation to the condition which the property is in at the time, or to the use which he makes of it, but is entitled to receive its market value for any purpose to which, in the judgment of the commissioners, it is adapted. He is, however, not entitled to be paid more merely because the land is peculiarly adapted to the use to which it is intended to be applied. The fact that the land will be used for a reservoir rather than a farm or any other lawful business, forms no material part of which an award is to be made. Whether the land taken is to be used for reservoir, or a garden, is a question, so far as the compensation is concerned, with which the commissioners have nothing to do. Their duty is to award compensation for the taking of the land and not for the use to which it will be applied when taken. *The Albany Northern R. R. Co.*, 16 Barb., 68; *Matter of Daly*, App. Div., 394; *Matter of East River Gas Co.*, 119 App. Div., 10.

It is only when it is shown that it has a market value for some particular use, that the availability and adaptability of the property to the use, can be taken into account by the commissioners in determining its fair market value.

The owner is not entitled to swell the damages, beyond the fair market value of the land at the time it is taken, by any consideration of the chances or probability that sometime in the future, it may be used for some purpose to which it is adapted, unless it appears that the market value of the property is enhanced by the chances of probability. As was stated in *Moulton v. Newburyport Water*

178 Co., (137 Mass. 163), "If there were different customers who were ready to give more for the land on account of the chances, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market these elements would necessarily be considered by the jury, or by a witness in forming an opinion of the market value." But the mere hopes of an owner that his property may at some future time be required for a reservoir or storage basin, for supplying the City of New York or any other city with water, cannot be considered; unless the probability of such an event, in the public mind, had in fact affected the fair market value at the time it was taken. (Matter of N. Y. L. & W. R. Co. v. Arnot, 27 Hun., 151.) This rule was stated by Mr. Justice Cullen in *Matters of Daly v. Smith* (18 App. Div., 197), where he said, "It is the market value of the property that is the measure of the compensation. When, therefore, it is sought to show that a tract of land has a use for a particular purpose, it must be also shown that it is marketable for that purpose, or has an intrinsic value."

It is contended on behalf of the appellant that an improper basis was adopted by the commissioners in determining the compensation which ought justly to have been made him. (1) In excluding from consideration as an element in the market value of the property, the structural value of the buildings upon it. (2) In excluding evidence of the adaptability and availability of the property for reservoir purposes. (3) In excluding evidence of the value of the property as a part of a reservoir site. It is argued that the award is much less than it would have been had this evidence been admitted and considered. It is unnecessary to discuss the question whether the commissioners erred in refusing to permit the owner to show the value of the structures upon the land, further than to say, that it is the market value of the land with the buildings and other improvements thereon, that is the measure of compensation. 179 The buildings put upon the land are simply adjuncts to the freehold. They add to its value and are properly included in an appraisal of it but it is the value of the land and structures which is to be determined, and not the cost of them. For these reasons it has been held that testimony of the structural value of the buildings is not competent in proceedings of this kind. (Matter of the City of New York, 118 App. Div., 272; *Village of St. Johnsville v. Smith*, 184 N. Y., 34.)

It is probably true that the commissioners might properly have received evidence tending to show that the Ashokan reservoir site is the cheapest, best and most available site for water supply purposes and for furnishing water to the City of New York, but it was not error to exclude the testimony offered as those facts were stated in the petition, and no issue was raised over the question of a demand on the part of the City of New York or the availability or adaptability of the property. When the material allegations in a verified petition in a special proceeding are not denied by some counter affidavit they stand sufficiently proved for the purpose of the ultimate order. (26 St. R., 968; 99 N. Y., 12).

The proceeding was based upon a demand for the property on part of the City of New York and its adaptability and availability in conjunction with other parcels for a reservoir site. The record shows that the commissioners understood that these facts were established, and that they went no farther than to hold that the facts did not be considered, in forming an opinion of the market value of the property, in the absence of any evidence showing that they enhanced or affected its value, before it was appropriated by the

It was for the commissioners to determine whether the land was really salable and marketable as a part of a reservoir site, and if they so found, the real price or sum that could be obtained for it. The appellant did not prove or attempt to prove that the value of the property in question or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes before the commencement of this proceeding. There is no shadow of evidence of a prior demand for the property as a reservoir site or of any owner who would give more for it for that purpose, or of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined. In the absence of such evidence it is plain that the appellant has reaped the benefit of everything which enhanced the value of his property, except the increase caused by the taking of it by the City. His offer was in effect, to prove an increase in value due to the action of the site by the City and the proceeding to acquire it. He did not merely bring up the question of the value of the property taken from the appellant, but that value plus an increase in value caused by the proceeding to condemn. As I have already observed, the question was the market value of the property unaffected by the determination to use it for a reservoir site, and to this question the commissioners rightly confined the evidence.

As to the authority of the Court to allow costs under Section 3240 of the Code of Civil Procedure, I agree with the opinion of Mr. Justice Mills in *Matter of the Board of Water Supply of the City of New York*, which was another proceeding under this statute, that the appellant is not entitled to costs at the rates allowed for similar cases in an action. Section 13 of the statute in question provides an allowance to parties appearing in the proceeding, of such sums as the commissioners may deem proper to be allowed, "as expenses and disbursements, including reasonable compensation for witnesses." My opinion is that the legislature intended by this provision to regulate the question of costs in proceedings under the statute. Laws are presumed to be formed with deliberation and with full knowledge of all existing ones on the subject (*Brown v. Lease*, 5 Hill, 221). So it is but reasonable to conclude that the legislature in passing this statute did not intend to give the right to costs under it, should be governed by the general rule as to costs in special proceedings. This case is to be distinguished from *Matter of the Application of the City of New York to Acquire Certain Real Estate in the Town of Hempstead* (125

App. Div., 219), relied upon by the appellant. Chapter 725 of the Laws of 1905, under which that proceeding was brought, contains no provision for the allowance of costs, expenses or disbursements to the claimant. "It does not," said Mr. Justice Woodward in that case, "assume to be an act to govern the proceedings in condemnation in whole, * * * it relates to the matter of proceedings under other statutes, whether general or special, and being a statute in *pari materia*, is to be read and construed in connection with these other statutes, rather than as superseding them."

Chapter 724 is a special statute. It pretends to cover the whole question of condemnation proceedings by the City of New York to acquire lands for the purpose of a reservoir. It prescribes an independent procedure and was evidently intended to furnish the whole law on the particular subject. I am also of the opinion that the compensation awarded is adequate in view of the evidence taken. If these views are correct they lead to an affirmance of the order appealed from, with costs.

182 *Stipulation Waiving Certification on Appeal to Court of Appeals.*

It is hereby stipulated that the foregoing papers are true and correct copies of the notice of appeal to the Court of Appeals, the order of affirmance of the Appellate Division, Third Department, and the judgment of affirmance appealed from, and all the evidence taken herein, and all papers upon which the court below acted in making the order and judgment of affirmance appealed from, and the whole thereof, all of which papers are now on file in the office of the Clerk of Ulster County; and

It is further stipulated that the appeal may be heard upon the foregoing papers, without certification as required by sections 1315, 1353, or other sections of the Code of Civil Procedure or otherwise, certification thereof being hereby waived.

Dated, New York, February 25, 1909.

JEROME H. BUCK,
Attorney for Appellant.
F. K. PENDLETON,
Attorney for Respondent.

STATE OF NEW YORK,
Ulster County Clerk's Office, ss:

I, John D. Fratsher, Clerk of the County of Ulster, do hereby certify that I have compared the preceding copy Case on Appeal with the original on file in this office, and that the same is a correct transcript from said original case and of the whole thereof.

I- Witness Whereof, I have hereunto set my hand and affixed the seal of said Court and County, this 22- day of Dec., 1909.

[Seal of Ulster County, State of New York.]

JOHN D. FRATSHER, *Clerk.*

83

Court of Appeals.

STATE OF NEW YORK, ss:

pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 11th Day of May in the Year of Our Lord One Thousand Nine Hundred and Nine, Before the Judges of said Court.

Witness, The Hon. Edgar M. Cullen, Chief Judge, Presiding
R. M. Barber, Clerk.

Remittitur, May 12th, 1909.

in the Matter of the Application and Petition of J. EDWARD SIMMONS and Others Constituting the Board of Water Supply of the City of New York to Acquire Real Estate, etc.

Parcel 246. Section 6.

Be it Remembered, Yhat on the 8th day of March, in the year of our Lord one thousand nine hundred and nine, James P. McGovern, claimant, the appellant in this proceeding came here into the Court of Appeals, by Jerome H. Buck, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And J. Edward Simmons and others the respondents in said proceeding afterwards appeared in said Court of Appeals by Francis K. Pendleton, Corp. Counsel.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals heard this cause argued by Mr. D. Cady Herrick of Counsel for the Appellant and by Mr. John J. Linson of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And thereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
*Clerk of the Court of Appeals
of the State of New York.*

COURT OF APPEALS CLERK'S OFFICE,
ALBANY, May 12th, 1909.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.]

R. M. BARBER, *Clerk*.

STATE OF NEW YORK,
Ulster County Clerk's Office, ss:

I, John D. Fratsher, Clerk of the County of Ulster, do hereby certify that I have compared the preceding copy Order of Affirmance with the original on file in this office, and that the same is a correct transcript from said original Order and of the whole thereof.

I- Witness Whereof, I have hereunto set my hand and affixed the seal of said Court and County, this 22-day of Dec. 1909.

[Seal of Ulster County, State of New York.]

JOHN D. FRATSHER, *Clerk*.

184½ [Endorsed:] Copy Supreme Court, Ulster County, In the Matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York to acquire real estate for and on behalf of the City of New York under Chapter 724 of the Laws of 1905, and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York. Ashokan Reservoir. Section 6. Parcel 246. Order of Affirmance.

185

Supreme Court, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York.

Parcel 246, Section No. 6.

James P. McGovern, Claimant-Appellant.

SIR: Take notice that the remittitur from the Court of Appeals in the above entitled proceeding has been filed in the office of the Clerk of the County of Ulster, and that on the 19th day of June 1909, the undersigned will move this Court at a Special Term thereof, to be held at the County Court House in the City of King-

ton, Ulster County, New York, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order that the order of the Court of Appeals be made the order of this court.

Dated May 25th, 1909.

FRANCIS K. PENDLETON,
*Attorney for Respondent, Corporation Counsel,
Hall of Records, New York City.*

To Jerome H. Buck, Esq., Attorney for Appellant.

STATE OF NEW YORK,

Ulster County Clerk's Office, ss:

I, John D. Fratsher, Clerk of the County of Ulster, do hereby certify that I have compared the preceding copy Notice of filing Remittitur and of Motion with the original on file in this office, and that the same is a correct transcript from said original Notice and of the whole thereof.

I- Witness Whereof, I have hereunto set my hand and affixed the seal of said Court and County, this 22 day of Dec. 1909.

[Seal of Ulster County, State of New York.]

JOHN D. FRATSHER, *Clerk.*

85½ Please take notice that the within is a true copy of an
— duly entered and filed in the office of the Clerk of
Ulster in the within entitled matter on the — day of —.

Dated, —.

FRANCIS K. PENDLETON,
Corporation Counsel.

To — —.

[Endorsed:] Supreme Court, County of Ulster. In the Matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York to acquire real estate for and on behalf of the City of New York under Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York. Ashokan Reservoir. Section 6, Parcel 246. Copy, notice of filing remittitur and of motion. Francis K. Pendleton, Corporation Counsel, Hall of Records, Corner Chambers and Center Streets, New York City.

186 At a Special Term of the Supreme Court, Held in and for the County of Ulster, at the County Court House, in the City of Kingston, on the 19th day of June, 1909.

Present: Hon. James A. Betts, Justice.

Supreme Court, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholsome Water for the Use of the City of New York; JAMES P. MCGOVERN, Claimant-Appellant.

Parcel 246, Section 6.

James P. McGovern, having appealed to the Court of Appeals from the order of the Appellate Division of this Court, Third Judicial Department, affirming a final order entered herein in the office of the Clerk of the County of Ulster on the 17th day of April 1908, which said order of affirmance was entered in the office of the Clerk of the Appellate Division, Supreme Court, Third Department, on the 22nd day of January 1909, and a copy thereof in the office of the Clerk of the County of Ulster on the 30th day of January 1909, and from each and every part of the said order as well as from the whole thereof, and from the judgment of affirmance entered on the said order of affirmance for the sum of One Hundred and three dollars and five cents (\$103.05), which said judgment was entered in the office of the Clerk of the County of Ulster on the 13th day of February 1909, and from each and every part of said judgment, as well as from the whole thereof; and said Court of Appeals having affirmed the said order of the Appellate Division of this court,

Now on reading and filing the remittitur from the said Court of Appeals, and on motion of Francis K. Pendleton, attorney for the respondent, it is

Ordered, that the order of the Court of Appeals be and the same hereby is made the order of this court.

JAMES A. BETTS, J. S. C.

JOHN D. FRATSHER, Clerk.

STATE OF NEW YORK,
Ulster County Clerk's Office, ss:

I, John D. Fratsher, Clerk of the County of Ulster, do hereby certify that I have compared the preceding copy Order with the original on file in this office, and that the same is a correct transcript from said original Order and of the whole thereof.

I- Witness Whereof, I have hereunto set my hand and affixed the seal of said Court and County, this 22 day of Dec. 1909.

[Seal of Ulster County, State of New York.]

JOHN D. FRATSHER, *Clerk.*

187½ Please take notice that the within is a true copy of an order duly entered and filed in the office of the Clerk of Ulster in the within entitled matter on the 21st day of June, 1909.

Dated June 21, 1909.

FRANCIS K. PENDLETON,
Corporation Counsel.

To Jerome H. Buck, Esq., Attorney for Appellant.

[Endorsed:] Supreme Court, County of Ulster. In the matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York to acquire real estate for and on behalf of the City of New York under Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York. Ashokan Reservoir. Section 6. Parcel 246. Copy. Order. Francis K. Pendleton, Corporation Counsel, Hall of Records, Corner Chambers and Center Streets, New York City. June 21, 1909.

188 Supreme Court, Ulster County.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholsome Water for the Use of the City of New York; JAMES P. MCGOVERN, Claimant-Appellant.

Section No. 6, Parcel No. 246.

The appeal of the claimant James P. McGovern, from the order of the Appellate Division of this court, unanimously affirming in all things the order of the Special Term of this court, confirming the First Separate Report of Hon. Edgar L. Fursman, Edward H. Nicoll and Charles B. Cox, commissioners of appraisal for Section No. 6, Ashokan Reservoir, which order of confirmation was filed in the office of the Clerk of the County of Ulster on the 17th day of April, 1908, as far as said order affects parcel No. 246 in Section No. 6, except that part relating to a mortgage on the aforesaid parcel, having been brought on for argument in the Court of Appeals, and the

said court of Appeals having handed down its order affirming in all things the said order of the Appellate Division with costs, and the remittitur of the Court of Appeals having been duly filed in this court, and the said order of the Court of Appeals having been duly made the order of this court, and the costs of the respondent having been duly taxed by the Clerk at the sum of One Hundred and thirty-eight dollars and sixty-eight cents (\$138.68), now on motion
 189 of Francis K. Pendleton, Corporation Counsel of the City of New York, it is

Ordered, That the said order of the Appellate Division be and the same hereby is in all things affirmed, and that the respondent, the city of New York, recover of the appellant James P. McGovern, and that said appellant pay to said respondent the sum of \$138.68 costs of the appeal to the Court of Appeals in this proceeding.

JOHN D. FRATISHER, *Clerk.*

Dated June 29th, 1909.

STATE OF NEW YORK,
Ulster County Clerk's Office, ss:

I, John D. Fratisher, Clerk of the County of Ulster, do hereby certify that I have compared the preceding copy Judgment of Affirmance with the original on file in this office, and that the same is a correct transcript from said original Judgment, and of the whole thereof.

I- Witness Whereof, I have hereunto set my hand and affixed the seal of said Court and County, this 22 day of Dec. 1909.

[Seal of Ulster County, State of New York.]

JOHN D. FRATISHER, *Clerk.*

189½ [Endorsed:] Supreme Court, Ulster County. Copy. In the Matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York to acquire real estate for and on behalf of the City of New York under Chapter 724 of the Laws of 1905 and the Acts Amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York. Ashokan Reservoir. Section 6. Parcel 246. Judgment of Affirmance. Francis K. Pendleton, Corporation Counsel, Hall of Records, Corner Chambers and Center Streets, New York City.

Petition for Writ of Error.

In the Supreme Court of the United States.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York; JAMES P. MCGOVERN, Claimant & Plaintiff in Error; THE CITY OF NEW YORK, Petitioner & Defendant in Error.

Ashokan Reservoir, Section No. 6, Parcel No. 246.

To the Supreme Court of the United States:

The petition of James P. McGovern, the claimant of parcel No. 246 in Section No. 6, and the plaintiff in error herein, respectfully shows that prior to and on July 22nd, 1907, your petitioner was the owner of the fee of a certain piece or parcel of land in the town of Hurley, Ulster County New York. That on said date, under and pursuant to Chapter 724 of the Laws of 1905 and the acts amendatory thereof, and supplemental thereto, The City of New York became vested with the fee of the said premises.

That thereafter, your petitioner, the said James P. McGovern, prosecuted his claim for damages against the said City of New York, for the taking of the aforesaid parcel of land, before the Commissioners of Appraisal appointed by the Supreme Court of the State of New York.

That the said Commissioners of Appraisal deprived this petitioner of his property, without due process of law and without
191 awarding to him just compensation, and denied to him the equal protection of the law in contravention of the fourteenth amendment of the Constitution of the United States, as will more fully appear by the assignments of error filed herewith and the record in the said proceeding.

That thereafter, the report and rulings of the said Commissioners of Appraisal were confirmed by the Supreme Court of the State of New York, held in and for Ulster County, by an order made and entered in the office of the Clerk of said County, on the 15th day of February, 1908, against the protest and objection of your petitioner.

That thereafter your petitioner duly appealed to the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, pursuant to the statute in such cases made and provided, and thereafter, on the 22nd day of January, 1909, the said order of confirmation and report of the Commissioners, was affirmed by the Appellate Division of the Su-

preme Court of the State of New York, held in and for the Third Judicial Department, and an order entered in the office of the Clerk thereof, and on the 30th day of January, 1909, a certified copy of said order, pursuant to the statutes of the State of New York was filed in the office of the Clerk of the Supreme Court, Ulster County, and thereafter, on the 13th day of February, 1909, a judgment of affirmance upon the said order of affirmance of the Appellate Division of the Supreme Court, Third Department, was entered in the office of the Clerk of the Supreme Court, Ulster County.

Thereafter, on the 17th day of February, 1909, your petitioner appealed from the said judgment and order of affirmance to the Court of Appeals of the State of New York, and on the 11th day of

192 of the State of New York, affirming the said judgment and order of the Appellate Division, and a copy of the said order was entered in the office of the Clerk of the Court of Appeals, on the said day, and a certified copy thereof, pursuant to the statute in such cases made and provided, remitted to the Clerk of the Supreme Court of the State of New York, for the County of Ulster, which said remittitur was filed in the office of the Clerk of said Supreme Court of the County of Ulster, on the 17th day of May, 1909, and thereafter, on the 21st day of June, 1909, an order was duly made and entered in the office of the Clerk of the Supreme Court of Ulster County, making said judgment and order of the Court of Appeals, the judgment and order of the Supreme Court of the State of New York, and thereafter, on the 29th day of June, 1909, a judgment of affirmance on said order of affirmance of the said Court of Appeals, was entered in the office of the Clerk of the Supreme Court of the County of Ulster; and your petitioner further states, that in the said Court of Appeals, as well as in the court below, there was drawn in question, the validity of the said statutes of the State of New York and the authority exercised thereunder by the defendant in error, the petitioner below, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity and of the validity of the rulings of the said Commissioners to the prejudice of your petitioner, all of which will appear more in detail from the record and assignments of error herein, and the said James P. McGovern, claimant in the above entitled proceeding, and plaintiff in error herein, feeling aggrieved by the said orders, judgment and report hereinbefore recited, and by the rendition of the said orders and judgment, and

193 by the proceedings had on the trial, comes now by Jerome H. Buck, his attorney, and petitions for a writ of error to the Supreme Court of the State of New York, commanding that court to send a record of the proceedings in the said suit or proceeding aforesaid, and all things concerning the same to the Justices of the Supreme Court of the United States and for the usual citation to the end that the record of the proceedings being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein, so as to correct all errors which of right

and according to law and to the Constitution of the United States, ought to be done, and your petitioner also prays for such other orders and process as may be proper, and that an order may be made fixing the amount of the security which the claimant and plaintiff in error shall give and furnish upon such writ of error, and for such other and further relief as may be just and proper in the premises, and your petitioner will ever pray.

Dated, June 28, 1909.

JAMES P. MCGOVERN,
Petitioner.

JEROME H. BUCK,
Attorney for Petitioner.

O. & P. O. Address, 165 Broadway, Borough of Manhattan, City of New York.

194 Endorsement: In the Supreme Court of the United States.

In the Matter of the Application and Petition of the Board of Water Supply of the City of New York, etc. Sec. 6, Par. 246. Original Petition for Writ of Error. Jerome H. Buck, Attorney for Claimant & Plaintiff in error, 165 Broadway, Borough of Manhattan, New York City. Received on Application for writ of error, Dec. 13, 1909. Edgar M. Cullen, Chief Judge Court of Appeals. Due Service of the within Petition admitted this 22nd day of December, 1909. Francis K. Pendleton, Attorney for def't in error.

194½ [Endorsed:] In the Supreme Court of the United States.

In the Matter of the Application and Petition of the Board of Water Supply of the City of New York, etc. Sec. 6, Par. 246. Copy. Petition for Writ of Error. Jerome H. Buck, Attorney for Claimant & Plaintiff in error, 165 Broadway, Borough of Manhattan, New York City.

195 *Assignment of Errors.*

In the Supreme Court of the United States.

In the Matter of the Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK, and CHARLES A. SHAW, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate For and on Behalf of The City of New York, Under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York; James P. McGovern, Claimant & Plaintiff in Error; The City of New York, Petitioner & Defendant in Error.

Ashokan Reservoir. Section No. 6. Parcel No. 264.

Comes now James P. McGovern, the plaintiff in error and the claimant below for parcel No. 246 in Section No. 6 of the Ashokan

Reservoir in the above entitled proceedings, by Jerome H. Buck, his attorney, and says:

That in the record, proceedings, appraisal, report orders and final judgments of the Court of Appeals of the State of New York, and of the Supreme Court of the State of New York, and of the Commissioners of Appraisal, appointed herein by the Supreme Court of the State of New York, in the above entitled proceeding or suit, manifest error was committed in this.

1. That in violation of the fourteenth amendment of the Constitution of the United States, the Commissioners of Appraisal duly appointed herein by the Supreme Court of the State of New York, deprived the said James P. McGovern of the parcel of land known as parcel No. 246 in Section No. 6 of the Ashokan Reservoir, 196 of which he was the owner in fee, without due process of law and without just compensation by excluding and refusing to consider evidence against the exception of the claimant and plaintiff in error, to prove the market value of said parcel No. 246 in Section No. 6 of the Ashokan Reservoir, owned in fee by the said James P. McGovern, which the plaintiff in error offered to introduce, which evidence would have shown that the said parcel of land was part of a natural reservoir site, and by reason of such fact, the value of the said property was much greater than that of ordinary agricultural land, similarly situated, not suitable or adaptable for reservoir purposes, and was much greater than the award made to this claimant for said property.

2. That in violation of the fourteenth amendment of the Constitution of the United States, the Supreme Court of the State of New York and the Court of Appeals of the State of New York deprived the said James P. McGovern of the parcel of land known as Parcel No. 246, Section 6, of the Ashokan Reservoir, of which he was the owner in fee, without due process of law and without just compensation, by confirming and affirming the report of the said Commissioners of Appraisal, and the award made therein, although the said Commissioners excluded and refused to permit to be introduced and refused to consider proper and competent evidence which would have shown that the said parcel No. 246 in Section No. 6 of the Ashokan Reservoir owned by the claimant below and the plaintiff in error here was part of a natural reservoir site, and there was a demand for such sites, and by reason of such facts, the value of the property was much greater than ordinary agricultural land similarly situated, not suitable or adaptable for reservoir purposes, and the value was much greater than the award made to this claimant for said property.

3. That the aforesaid State Courts and the aforesaid Commissioners of Appraisal erred in refusing to receive or consider evidence which was offered to show the most advantageous use to which this property could be put; in refusing to take into consideration, in awarding damages for the taking of said parcel No. 246 in Section No. 6 as evidence of the market value of the property, the most advantageous uses to which the said parcel of land could be put, thereby depriving the plaintiff in error of his

property without due process of law, and without just compensation, in violation of the fourteenth amendment of the United States Constitution.

4. That in violation of the fifth and fourteenth amendments of the Constitution of the United States, the Commissioners of Appraisal refused to receive and consider any evidence of the structural value of the buildings erected upon said parcel of land known as parcel No. 246 in Section No. 6 of the Ashokan Reservoir, at the time when the City of New York took title to the same, and thereby deprive the said James P. McGovern of his property without due process of law without just compensation and of the equal protection of the law, as Chapter 724 of the laws of 1905, under which this proceeding was instituted, in Sections 13 and 25 provides that railroad corporations and persons or corporations owning property used for a railroad, highway or other public purposes shall be paid all losses, damage and expense resulting to such persons or corporation, and by the ruling of the said Commissioners of Appraisal, the plaintiff in error herein was deprived of the equal protection of the law, in that he was not allowed all his loss, damage or expense, for the structures erected upon his said property.

5. That in violation of the fifth and fourteenth amendments of the Constitution of the United States, the aforesaid Supreme Court of the State of New York, and the Court of Appeals of the State of New York deprived the plaintiff in error herein and the claimant below of his property without due process of law, without just compensation, and deprived him of the equal protection of the law, by confirming and affirming the report of the Commissioners of Appraisal, refusing as hereinbefore mentioned, to receive, and in refusing to consider any evidence of the structural value of the buildings erected upon said parcel of land, at the time the City of New York became vested with the title to the same.

6. That the said State Court and the Commissioners of Appraisal violated the fourteenth amendment of the Constitution of the United States, by failing to make any award to the claimant and plaintiff in error for the damages done to the parcel of land of which parcel No. 246 in Section No. 6 is a part, which said parcel was not taken by the City of New York, defendant in error herein, although the uncontradicted evidence was that the claimant and plaintiff in error suffered damage by reason of the taking of parcel No. 246 in Section No. 6.

7. That the aforesaid State Courts and the aforesaid Commissioners of Appraisal violated the fifth and fourteenth amendments of the United States Constitution, in failing to allow to the claimant and plaintiff in error, costs before and after notice of trial and a trial fee, as the City of New York made no offer to purchase this property, although it was authorized to do, and as in other condemnation proceedings instituted by the City of New York, for water supply purposes, in other cases such costs in addition to an allowance of 5% are regularly made in the said State Courts and are provided for by Section 496 of Chapter — of the laws of 1901 and other laws of the State of New York, and by discriminating against the claim-

ant in this respect, the said State Courts have denied to this claimant the equal protection of the laws and just compensation.

199 8. That the aforesaid State Courts and the aforesaid Commissioners of Appraisal violated the fourteenth amendment of the Constitution of the United States, and did not award this claimant just compensation, by failing to allow this claimant, the actual disbursements expended by this claimant and plaintiff in error in good faith, for the lawful subpoena fee and mileage required by the laws of the State of New York paid to J. Waldo Smith, a material and necessary witness in this proceeding, being the sum of Nine (\$9.00) Dollars, and the subpoena fee and mileage paid to Charles N. Chadwick, a necessary and material witness for the claimant, amounting to \$9., each of which witness testified on the trial of this proceeding, and which sum of \$18, was expended by this claimant in good faith, for the lawful witness and mileage fee of the said witnesses.

9. That the aforesaid State Courts and the aforesaid Commissioners of Appraisal in construing the words "just and equitable compensation as used in the act under which this proceeding was instituted, not to mean all loss, damage or expense direct or consequential, suffered by this claimant and plaintiff in error, deprived this claimant of his property without due process of law and without just compensation in violation of the fourteenth amendment of the Constitution of the United States, and denied to this claimant, the same right to compensation given to railroad and other corporations, and applied to this claimant's property, a different rule of compensation from that which the aforesaid condemnation act, being Chapter 724 of the laws of 1905, expressly provides in favor of railroad and other corporations under Sections 13 and 25 thereof, and thereby deprives this claimant and plaintiff in error of the rights and privileges secured to railroad and other corporations who own
200 a part of the said property to be condemned pursuant to the provisions of the said act, in violation of the fifth and fourteenth amendments of the Constitution of the United States.

10. That Chapter 724 of the laws of 1905 of the State of New York, being the act under which the property of this claimant and plaintiff in error has been condemned by the aforesaid State Courts and the aforesaid Commissioners of Appraisal, as construed by the said State Courts and the said Commissioners of Appraisal in this proceeding, confiscates the property of this claimant, and the said act as construed by the said State Courts is unconstitutional and void, and is in violation of the fifth and fourteenth amendments of the United States Constitution.

Wherefore the said James P. McGovern claimant and plaintiff in error prays that the report, orders and judgments of the said Commissioners of Appraisal, of the said State Supreme Court, and of the said Court of Appeals of the State of New York, be reversed, and that the said Supreme Court be directed to grant a new trial of said cause, and that the claimant and plaintiff in error have such other further and additional relief as may be proper in the premises.

JEROME H. BUCK.

Attorney for Plaintiff in Error.

O. & P. O. Address, 165 Broadway, Borough of Manhattan, City of New York.

201 Endorsement: In the Supreme Court of the United States. In the matter of the Application and Petition of the Board of Water Supply of the City of New York, etc. Sec. 6, Par. 246. Original Assignments of Error. Jerome H. Buck, Attorney for Claimant & Plaintiff in Error, 165 Broadway, Borough of Manhattan, New York City. Received on application for writ of Error, Dec. 13, 1909. Edgar M. Cullen, Chief Judge, Court of Appeals. Service of the within Assignments of error admitted this 22nd day of December, 1909. Francis K. Pendleton, Attorney for Def't in Error.

201 1/2 [Endorsed:] In the Supreme Court of the United States. In the Matter of the Application and Petition of the Board of Water Supply of the City of New York, etc. Sec. 6, Par. 246. Copy. Assignments of Error. Jerome H. Buck, Attorney for Claimant & Plaintiff in Error, 165 Broadway, Borough of Manhattan, New York City. Rec'd on application for writ of error, Dec. 13, 1909. Edgar M. Cullen, Chief Judge. Due service of the within petition admitted this 22nd day of December, 1909. Francis K. Pendleton, Attorney for Def't in Error.

202 Know all men by these presents, that we James P. McGovern of the City, County and State of New York, as principal, and the Illinois Surety Company, having an office and principal place of business for the State of New York at No. 5 Nassau Street, in the Borough of Manhattan, City and State of New York, as surety, are held and firmly bound unto the City of New York, a municipal corporation organized under the Laws of the State of New York, in the full and just sum of five hundred (\$500) dollars to be paid to the said City of New York, its certain attorney, successors and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 9th day of December in the year of our Lord one thousand nine hundred and nine

Whereas, lately at a plea in the Court of Appeals of the State of New York, held at Albany, New York on the 27th day of April, 1909, on an appeal from final order and judgment of the Supreme Court of New York in a proceeding pending in the Supreme Court of the State of New York entitled "In the matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of The City of New York, to acquire real estate for and on behalf of The City of New York, under Chapter 724 of the laws of 1905 and the acts amendatory thereof, in the town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of The City of New York, Parcel No. 246 in Section No. 6" in which the City of New York was the petitioner and James P. McGovern, claimant, an order and a judgment upon the return from said Supreme Court was rendered against the said James P. McGovern, and in favor of the City of New York, for the sum of one hundred thirty-eight and 68/100 (\$138.68) dollars costs and the said James P. McGovern having

obtained a writ of error and filed a copy thereof in the Clerk's office of the said Supreme Court to reverse the judgment and order in the aforesaid proceeding, and a citation directed to the said City of New York, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date thereof,

Now, the condition of the above obligation is such, that if the said James P. McGovern shall prosecute said writ of error to effect, and answer all costs if he fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

[SEAL.]

JAMES P. MCGOVERN. [L. S.]
ILLINOIS SURETY COMPANY,
By WIGHT V. ABBOTT,
Attorney-in-Fact.

203 CITY AND COUNTY OF NEW YORK,
State of New York, ss:

On the 9th day of December, 1909, before me personally came Wight V. Abbott, to me known, who, being duly sworn, did depose and say that he resides in the City of New York; that he is an attorney-in-fact of the Illinois Surety Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal attached to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided by law.

Sworn to before me the day and year first above written.

[SEAL.]

JOSEPH E. R. KUNZMANN,
*Notary Public, Commissioner of Deeds for the City
of New York, Residing in the Borough of Brooklyn.*

Power of Attorney from Illinois Surety Company, to D. Clinton Mackey, Wight V. Abbott and J. Elihu Root Kunzmann, or Any of Them.

Know All Men by these Presents: That the Illinois Surety Company, a corporation duly incorporated under the laws of the State of Illinois, and duly authorized to act as sole surety, in pursuance of the following resolution, which was passed by the Board of Directors of the Company at a meeting held March 25, A. D. 1907, to-wit:

"Resolved, that the President, Vice-President or an Acting-President is hereby authorized, empowered and directed to make and appoint such agents and to execute such Powers of Attorney to accept process for and on behalf of this Company, or to authorize the said attorneys and agents to execute Bonds, undertakings or writings obligatory in the nature thereof, for and on behalf of this Company,

as shall be needful and to the same extent and effect as though said appointments were severally made by separate action of the Board of Directors in each instance, and the Secretary or Assistant Secretary is hereby authorized, empowered and directed to authenticate such appointments, affixing the corporate seal of the Company to the same."

has made, constituted and appointed, and by these presents doth make, constitute and appoint D. Clinton Mackey, Wight V. Abbott and J. Elihu Root Kunzmann, of the City, County and State of New York, or any of them, its true and lawful attorneys-in-fact, with full power and authority to sign, seal, acknowledge and deliver in its name, place and stead, as surety, Bonds, undertakings or writings obligatory in the nature thereof, and when such Bonds, undertakings or writings obligatory are signed by the said D. Clinton Mackey, Wight V. Abbott and J. Elihu Root Kunzmann, or any of them, as attorneys-in-fact, to bind the Company as fully and to the same extent as if said Bonds, undertakings or writings obligatory in the nature thereof, were executed by the Executive Officers of this Company at its Home Office in the City of Chicago, State of Illinois, and the Company hereby ratifies and confirms all that its said attorneys-in-fact may do or lawfully cause to be done in the premises by virtue of these presents.

In Witness Whereof, the Illinois Surety Company has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereunto affixed this Twenty-eighth day of September, A. D. 1909.

[SEAL.]

ILLINOIS SURETY COMPANY,
By F. M. BLOUNT, *President*.

Attest:

H. W. WATKINS, *Secretary*.

I, Marshall A. Dunning, Ass't Secretary of the Illinois Surety Company, hereby certify that the above Power of Attorney is a true copy of the original records of said Company.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this Eleventh day of October, A. D. 1909, at the City of Chicago, State of Illinois.

MARSHALL A. DUNNING,
Ass't Secretary.

[SEAL.]

Statement of Financial Condition of Illinois Surety Company at the Close of Business September 30, 1909.

Assets.

Stocks and Bonds	\$426,899.63
Accrued Interest	4,064.55
Bills Receivable (secured by collateral)	1,918.63
Outstanding Premiums	54,503.30
Cash in Office and Depositories	46,885.59
Advances on Contracts	24,804.28
	<hr/>
	\$559,075.98

Liabilities.

Capital Stock	\$250,000.00
Surplus	50,000.00
Collateral Deposits	4,754.96
Reserve for Unadjusted Losses	39,144.91
Due for Re-Insurance	2,948.16
Commissions Accrued, not due	13,786.50
Accrued Taxes	1,800.00
Reserve for Re-Insurance	113,302.20
Undivided Profits	83,339.25
	<hr/>
	\$559,075.98

CITY AND COUNTY OF NEW YORK,

State of New York, ss:

I, Wight V. Abbott, Attorney-in-fact of the Illinois Surety Company, do hereby certify that the foregoing is a true and correct copy of the statement of assets and liabilities of the said Company at the clos of business, September 30, 1909.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this 9th day of December, 1909.

WIGHT V. ABBOTT,

Attorney-in-fact.

Subscribed and Sworn to before me this 9th day of December, 1909.

[SEAL.]

JOSEPH E. R. KUNZMANN,

*Notary Public, Commissioner of Deeds for the City
of New York, Residing in the Borough of Brooklyn.*

204 [Endorsed:] United States Supreme Court. In the matter of the Application and Petition of J. Edward Simmons et al., etc. Ashokan Reservoir, Section 36, Parcel #246. James P. McGovern, Claimant and Plaintiff in Error, versus The City of New York, Petitioner and Defendant in Error. (Original.) Undertaking to prosecute Writ of Error. Jerome H. Buck, Esq., 165 Broadway, N. Y. I approve of the within bond and of the sufficiency of the surety. Dec. 13, 1909. Edgar M. Cullen, Chief Judge, Court of Appeals. Service of a copy of the within undertaking admitted this 22nd day of Dec., 1909. Francis K. Pendleton, Attorney for Def't in Error.

204½ [Endorsed:] Copy. United States Supreme Court. In the matter of the Application and Petition of J. Edward Simmons et al., etc. Ashokan Reservoir, Section #6, Parcel #246. James P. McGovern, Claimant and Plaintiff in Error, versus The City of New York, Petitioner and Defendant in Error. Undertaking to prosecute Writ of Error. Jerome H. Buck, Esq., 165 Broadway, N. Y. I approve of the within bond and of the sufficiency of the surety. Dec. 13, 1909. Edgar M. Cullen, Chief Judge Court of Appeals. Illinois Surety Company, Chicago, Ill. Service of a copy of the within undertaking admitted this 22nd day of Dec., 1909. Francis K. Pendleton, Attorney for Def't.

205 *Citation.*

UNITED STATES OF AMERICA:

To the City of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York for the County of Ulster, in the proceeding entitled "In the Matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, Constituting the Board of Water Supply of The City of New York, to acquire real estate for and on behalf of The City of New York, under chapter 724 of the laws of 1905 and the acts amendatory thereof, in the town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of The City of New York, Ashokan Reservoir, Section No. 6, parcel No. 246," wherein James P. McGovern is the claimant and plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment and order rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Hon. Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 13th day of December, in the year of our Lord, one thousand nine hundred and nine.

EDGAR M. CULLEN,
*Chief Judge of the Court of Appeals of the
State of New York.*

206 Endorsement: United States Supreme Court. Sec. 6, Par. 246. In the Matter of the Application and Petition of the Board of Water Supply of the City of New York, etc. James P. McGovern, Plaintiff in Error, vs. The City of New York, Defendant in Error. Original Citation. Jerome H. Buck, Attorney for Plaintiff in Error, 165 Broadway, Borough of Manhattan, New York City. Due service of the within citation is hereby admitted. Dated, New York, Dec. 22nd, 1909. Francis K. Pendleton, Attorney for Defendant in Error.

207 [Endorsed:] United States Supreme Court. Sec. 6, Par. 246. In the Matter of the Application and Petition of the Board of Water Supply of the City of New York, etc., James P. McGovern, Plaintiff in Error, vs. The City of New York, Defendant in Error. Original Citation. Jerome H. Buck, Attorney for Plaintiff in Error, 165 Broadway, Borough of Manhattan, New York City. To —, Esq., Attorney for —. Due service of the within citation is hereby admitted. Dated, New York, Dec. 22, 1909. Francis K. Pendleton, Attorney for Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of New York, Possessors of the Return and Record in the Proceeding Entitled "In the Matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Town of Hurley, Ulster County, New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York," Parcel No. 246, in Section No. 6, of the Ashokan Reservoir, in Which James P. McGovern is the Claimant and the Plaintiff in Error, and the City of New York the Petitioner and the Defendant in Error, Greeting:

Because in the record and proceedings; as also in the rendition of the final orders and judgment of a cause in the Court of Appeals of the State of New York, wherein final judgment upon return from the Supreme Court of the State of New York, was rendered on the 11th day of May, 1909, that being the highest court of law and equity in the said state, in which a decision can be had in the suit or proceeding entitled "In the Matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, Constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of The City of New York, under chapter 724 of the laws of 1905 and the acts amendatory thereof, in the town of Hurley, Ulster County, New York, 209 for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York," Section No. 6, Parcel No. 246, Ashokan Reservoir, in which James P. McGovern is the claimant and plaintiff in error and the City of New York, the petitioner and defendant in error, and which have been remitted to said Supreme Court for execution, and which is now before you or some of you in said court; wherein was drawn in question the validity of Chapter 724 of the laws of 1905 of the State of New York or an authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity, a manifest error hath happened to the great damage of said James P. McGovern as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment herein be given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 12th day of January, 1910, that the record and proceedings aforesaid

being inspected, the said Supreme Court may cause further to be done therein, to correct the error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of December, One thousand nine hundred and nine and of the Independence of

210 the United States, the one hundred and thirty-third year.

[SEAL.]

JOHN A. SHIELDS,

*Clerk of the Circuit Court of the United States
for the Southern District of New York.*

The foregoing writ is hereby allowed.

EDGAR M. CULLEN,

*Chief Judge of the Court of Appeals of
the State of New York.*

211 Endowment: In the Supreme Court of the United States.
In the Matter of the Application and Petition of the Board
of Water Supply of the City of New York, etc. Sec. 6, Par. 246.
James P. McGovern, Plaintiff in Error, vs. The City of New York,
Defendant in Error. Original. Writ of Error. Jerome H. Buck,
Attorney for Plaintiff in Error, 165 Broadway, Borough of Man-
hattan, New York City. Due service of the within Writ of Error
with allowance is hereby admitted. Dated, New York, Dec. 22nd,
1909. Francis K. Pendleton, Corporation Counsel, Attorney for
Defendant in Error.

212 [Endorsed:] In the Supreme Court of the United States.
In the Matter of the Application and Petition of the Board
of Water Supply of the City of New York, etc., Sec. 6, Par. 246.
James P. McGovern, Plaintiff in Error, against The City of New
York, Defendant in Error. Original. Writ of Error. Jerome H.
Buck, Attorney for Claimant & Plaintiff in Error, 165 Broadway,
Borough of Manhattan, New York City. To —, Esq., Attorney
for —. Due service of the within writ of error as the allow-
ance is hereby admitted. Dated, New York, Dec. 22nd, 1909.
Francis K. Pendleton, Corporation Counsel, Attorney for Defendant
in Error.

213 UNITED STATES OF AMERICA,
State of New York, County of Ulster, ss:

I, John D. Frstsher, Clerk of the Supreme Court of the State of
New York, for the County of Ulster, by virtue of the foregoing writ
of error and in obedience thereto, do hereby certify the following
pages numbered from 1 to 206 inclusive, contain a true and com-
plete transcript of the record and proceedings had in the Court of
Appeals and the proceedings had in the Supreme Court of the
State of New York, Ulster County, upon the return of the record
from the Court of Appeals, and also all proceedings had in the Su-
preme Court of the State of New York, a true and complete and accu-
rate copy of all papers filed on the application for the writ of error

and also the endorsements thereon, in the proceeding entitled "In the Matter of the Application and Petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, Constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of The City of New York, under chapter 724 of the laws of 1905 and the acts amendatory thereof, in the town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of The City of New York, Parcel No. 246, Section No. 6, in which James P. McGovern is the claimant and plaintiff in error, and The City of New York is the petitioner and defendant in error" as the same remain of record and filed in my office.

In witness whereof, I have caused the seal of the said Court to be affixed at the City of Kingston, in the County of Ulster, State of New York, this 27th day of December, in the year of our Lord, one thousand nine hundred and nine.

[SEAL.]

JOHN D. FRATSHER, *Clerk*.

Endorsed on cover: File No. 21,947. New York supreme court. Term No. 395. James P. McGovern, plaintiff in error, vs. The City of New York. Filed December 30th, 1909. File No. 21,947.

OCT 2 1912
JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of the United States

~~No. 205~~ No. 15.

IN THE MATTER
OF

The application and petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

JAMES P. McGOVERN,

Plaintiff-in-Error.

THE CITY OF NEW YORK,

Defendant-in-Error.

(In error to the Supreme Court of the State of New York.)

BRIEF FOR PLAINTIFF-IN-ERROR.

JEROME H. BUCK,

Attorney for Plaintiff-in-Error.

J. J. DARLINGTON,
GEORGE GORDON BATTLE,
EDWARD A. ALEXANDER,

Of Counsel.



Subject Index of Brief for Plaintiff- in-Error.

	Pages
1. Statement Required by Rule 21	1-28
2. Written objections to Report of Commissioners of Appraisal	7-10
3. Offer to Prove	10-22
4. Specification of Errors	23-26
5. Arguments and Points	27-120
6. Opinion of Lacombe, J., in confirming Report in Sage vs. City of New York	30-32
7. Importance of Question Involved	27
8. FIRST POINT. The Commissioners of Appraisal and the Courts of the State of New York, confiscated the claimant's property in entirely excluding from consideration, as an element of value, its adaptability for use as part of a reservoir site	28-99
(A) In the case at bar, the City is condemning property from which it will derive a commercial profit	44-48
(B) The proposed testimony offered and rejected by the state courts is not speculative	48-63
(C) As a matter of fact, however, there were a number of prior demands for this particular property for this very purpose and offers were made to prove this	63-70

(D) The reasoning by which the Appellate Division of the Supreme Court of New York State reached its conclusion, which was affirmed without opinion by the State Court of Appeals, so far as it is clear and to be understood, is unsound in principle and necessarily leads to a false result and to the confiscation of the property of plaintiff-in-error	70-99
SECOND POINT. Market value is not always the true measure of just compensation	99-102
THIRD POINT. The adaptability of land for use as a reservoir or for water purposes has been taken into consideration as an element of value of such land in a number of well decided and carefully considered cases both in Great Britain and in the United States	102-107
FOURTH POINT. The fact that the plaintiff-in-error did not or could not alone use his property as a reservoir site does not deprive that property of its value as a reservoir site or a portion of a reservoir site	108-110
FIFTH POINT. The fact that the plaintiff-in-error was the owner of only a part of the reservoir site does not prevent that element of value being considered. It only goes to the weight that should be given to the evidence and the amount that should be allowed for this element of value	110-114

SIXTH POINT. By refusing to take into consideration, in estimating the value of the claimant's property, the value of its use or availability for use as a reservoir site, the plaintiff-in-error has been deprived of his property, without due process of law and has been denied the equal protection of the law, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States	114-120
SEVENTH POINT. For the foregoing reasons the final judgment and the final order of the Supreme Court of the State of New York, should be reversed and a new hearing granted to the plaintiff-in-error	120
APPENDIX	121-130
Manchester vs. Countess Ossalinski—Opinion of Groce, J.	121-125
Same case—Opinion of Stephen, J.	125-127
Cases where special values including reservoir, water storage and other purposes, have been considered, alphabetically arranged in appendix on pages	127-130

**Cases Cited in Brief are to be Found
on Following Pages.**

	Pages
Alloway vs. Nashville, 88 Tenn., 510	91
Amoskeog Co. vs. Black, 99 Pa. State, 152 ...	42
Boom Co. vs. Patterson, 98 U. S., 403	
28, 29, 31, 32, 43, 50, 55, 75, 81, 83, 89, 96, 97, 104, 107, 110.	
College Point vs. Denmet, 5 N. Y. Sup. Ct., 5; T. & C., 217; 2 Hun, 669	105
C. A. Cripps, Q. B.	102
Currie vs. Haverly, etc., Ry. Co., 52 N. J. Law, 381	57
Gage vs. Judson, 111 Fed. Rep., 358	42
Gardner vs. The Inhabitants of Brookline, 127 Mass., 358	42, 44
Gearhart vs. The Clear Spring Water Co., 202 Pa. State, 292	86, 106
Great Falls Mfg. Co. vs. U. S., 112 U. S., 645	56, 90, 108
Harwood vs. Village of West Randolph, 64 Vt., 41	42
Hooker vs. M. & W Railroad Co., 62 Vt., 47, 48, 49	43, 109, 110
In re Arbitration between Lough and the As- pasia Silloth, etc.	58, 105
Lake Shore & W. Ry. Co. vs. Chicago, etc., R. R. Co., etc.	50
Manchester Corporation vs. Ossalinski, Q. B. D.	56, 104, 115, 121 to 127
Matter of Brookfield, 176 N. Y., 138	56, 121
Matter of Daly, 72 App. Div., 396	44, 82, 105
Matter of East River Gas Co., etc., 119 A. D., 350	82
Matter of Gilroy, 85 Hun, 424,	
44, 50, 75, 81, 82, 83, 88, 90, 92, 94, 96, 97, 104, 110.	

	Pages
Matter of N. Y., L. & W. Ry., 27 Hun, 116	116
.....	44, 82, 85, 100
Mississippi Bridge Co. vs. Ring, 58 Mo., 491	110
Moulton vs. Newbury Water Co., 137 Mass., 163	82, 83, 107
Payne vs. Kansas and Arkansas Valley, etc., 46 Fed., 547	41
Rankin vs. Town of Harrisonburg, 52 S. E. Rep., 555	93
Riddel vs. Newcastle Water Co.	103
Russell vs. St. Paul, Minneapolis, etc., 33 Minn., 210	40
San Diego Land & Town Co. vs. Neale, 78 Cal., 63	39, 91, 93, 112
Sanitary District vs. Loughran, 160 Ill., 362	40
Sargent vs. The Town of Merrimac, 81 N. E. Rep., 970	33, 83, 99
Seattle and Montana Ry. Co. vs. Murphine, etc.	40, 60
Spring Valley Waterworks vs. Drinkhouse, 92 Cal., 528	51, 39, 44



IN THE
Supreme Court of the United States

IN THE MATTER

of

The Application and petition of J.
EDWARD SIMMONS, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board of
Water Supply of The City of
New York, to acquire real estate
for and on behalf of The City of
New York, under Chapter 724
of the Laws of 1905 and the acts
amendatory thereof, in the Town
of Hurley, Ulster County, New
York, for the purpose of provid-
ing an additional supply of pure
and wholesome water for the use
of The City of New York,

No. 395.

JAMES P. MCGOVERN,
Plaintiff-in-Error,

THE CITY OF NEW YORK,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NEW YORK.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement.

This is a writ of error to the Supreme Court of
the State of New York, upon the petition of James

P. McGovern, plaintiff-in-error, to review the record and proceedings of the said New York State Court, which resulted in a final order and judgment, awarding to the plaintiff-in-error (designated in the State Courts as the claimant and appellant) \$3300.00, for a piece of improved country real estate, of which he was the owner, consisting of 60.459 acres, the fee simple of which the City of New York acquired by virtue of the power of eminent domain, pursuant to Chapter 724 of the laws of 1905 of the State of New York, and of the acts amendatory thereof and supplemental thereto. This parcel of land forms a part of the Ashokan reservoir.

The special proceeding to condemn Mr. McGovern's property, for the purpose of using it as a part of a source of water supply for the City of New York, which has resulted in the writ of error from this court, was instituted in the Special Term of the Supreme Court of New York State, Ulster County, upon the written petition of J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York, pursuant to the aforesaid state statute (Chapter 724 of the Laws of 1905).

The relief sought in the said special proceeding and prayed for in the said written petition, upon which the said proceeding was instituted, was to acquire the fee simple of real estate for and on behalf of the City of New York, under the provisions of the aforesaid state statute, in the Towns of Olive and Hurley, Ulster County, for the purpose of providing an additional supply of pure and wholesome water for the use of the inhabitants of the City of New York; and with that object in view, the aforesaid petition prayed the appointment of three disinterested and competent freeholders as commissioners of appraisal to ascertain

the value of the property sought to be acquired, and to exercise and discharge all of the powers and duties conferred upon commissioners of appraisal by the aforesaid statutes.

The plaintiff-in-error made no defense or opposition to the said petition, and upon the return day thereof, the prayer of the said petition was granted, and the application of the defendants-in-error, constituting the said Board of Water Supply of the City of New York, resulted in the entry of an order in the office of the Clerk of the New York State Supreme Court, in Ulster County, on June 29th, 1907, appointing as commissioners of appraisal the Hon. Edgar L. Fursman, of Troy, N. Y., Edward H. Nicol, of New York, and Charles B. Cox, of Saugerties, Ulster County, for the purposes aforesaid.

The City of New York desired to acquire, pursuant to the aforesaid state statute, a great many thousand acres of land, which together composed what is known as the Ashokan Reservoir Site. In acquiring this reservoir site, the City prepared and filed maps as required by law, upon which were designated the parcels of land which it desired to acquire. The reservoir site was acquired by the City in sections. The site was divided up into various territorial sections, and separate sets of commissioners of appraisal were appointed by the court to value the land in each section. The claimant's property was designated as parcel No. 246, in Section No. 6.

The aforesaid state statute expressly provides that upon the filing of the written oaths of office of the commissioners of appraisal, appointed by the State Supreme Court, the title in fee simple of the land sought to be acquired by the City shall vest in the City of New York. After the appointment of the commissioners of appraisal in this proceeding, they

held their first meeting in Kingston, Ulster County, on July 22nd, 1907, as directed in the order appointing them, and on the same day, the said commissioners of appraisal filed their oaths of office.

Thereafter, the plaintiff-in-error filed with the said commissioners of appraisal, a written notice of his claim for damages, and for just compensation. A number of hearings were had before the said commissioners of appraisal as to the value of the claimant's property, and the amount of compensation which should be justly paid to him.

Thereafter, the said commissioners of appraisal filed a written report, in conformity with the statute, awarding to the claimant \$3300.00 for his 60.459 acres of land, together with all of the buildings, structures and improvements thereon. The claimant filed in the office of the Clerk of the State Supreme Court, for Ulster County, written objections to the said report. The petitioners, pursuant to the said statute, made a motion at the Special Term of the said State Supreme Court, in Ulster County, to confirm the said report of the said commissioners of appraisal. The claimant opposed this motion on all of the grounds contained in his written objections. The court decided the said motion in favor of the respondents, and an order was duly entered and filed in the office of the Clerk of the State Supreme Court of Ulster County, confirming said report. This is one of the orders which the plaintiff-in-error seeks to review before this court.

From the final order of the Special Term of the said State Supreme Court, confirming the report of the said commissioners of appraisal, the claimant appealed to the Appellate Division of the said Supreme Court, for the Third Judicial District. The said appeal came duly on to be heard, and resulted in the

said Appellate Division affirming the order of the said Special Term of the said State Supreme Court. An order of affirmance was duly entered on January 22nd, 1909.

Thereafter, the plaintiff-in-error appealed from the said order of the Appellate Division of the said State Supreme Court to the Court of Appeals of the State of New York. His appeal came duly on to be heard before the said State Court of Appeals, and after hearing argument, the said Court of Appeals affirmed the order of the Appellate Division, by an order duly made and entered in the office of the Clerk of the said Court of Appeals on May 12th, 1909, and remitted the proceedings to the said Special Term of the Supreme Court, for Ulster County, where an order and judgment on the remittitur were duly entered in the office of the Clerk of Ulster County on June 19th, 1909, making the order of the Court of Appeals the order of the said State Supreme Court.

Thereafter, the Hon. Edgar M. Cullen, Chief Judge of the Court of Appeals of New York State, allowed a writ of error from this court, a citation was duly issued out of this court to the defendants-in-error, and this proceeding was duly brought before this court for review.

In confirming the motion of the Board of Water Supply of the City of New York, the learned Judge at the Special Term of the State Supreme Court, for Ulster County, wrote an opinion, which is contained on pages 104-108 of the record.

The Appellate Division of the State Supreme Court in affirming the order referred to, also wrote an opinion, which is contained on pages 112-116 of the record.

The Court of Appeals of New York State wrote no opinion.

The main question litigated before the commissioners of appraisal, the Special Term, and the Appellate Division of the State Supreme Court and before the Court of Appeals of the said State, was the right of the plaintiff-in-error to offer evidence to show that his property was more valuable than ordinary farm land, in view of the fact that it constituted one of the component parts of a natural reservoir site, which was available and adaptable for water supply purposes, and the existence of demands in the open market for this property for such purposes.

The plaintiff-in-error, upon the suggestion of the commissioners of appraisal, for the purpose of properly raising this question, at the least expense and with the most expedition, made an extensive offer to prove that the character, location and surrounding conditions of his property made it more valuable than other property of a similar agricultural character, not so adaptable or so advantageously located, but the commissioners of appraisal refused to hear any evidence on this point, and ruled in advance, as a matter of law, that they would not permit the claimant to take testimony or produce witnesses on this point; that they would hear no evidence whatever on this question, if the claimant produced witnesses; that they could determine, without evidence, and without permitting the claimant to produce witnesses, that his contention was erroneous.

The Special Term and the Appellate Division affirmed this ruling on entirely different grounds, and the Court of Appeals gave no reason.

The claimant contended before the commissioners of appraisal, and before every one of the State Courts before whom this question arose on every occasion, that the State Courts, in refusing to permit this claimant to introduce the evidence which he offered, not

only proceeded upon an erroneous theory of law, but confiscated his property in violation of the Constitution of the United States, and of well established principles of law.

This question was raised by the plaintiff-in-error calling Mr. J. Waldo Smith, the chief engineer of the Board of Water Supply of The City of New York as a witness. Mr. Smith, having fully qualified as an experienced engineer, was asked a number of questions, with the object in view of showing that the claimant's property had an enhanced value, on account of its being a part of a natural reservoir site, for the acquisition of which various demands existed, both on the part of The City of New York, and on the part of others. Objections to these questions were sustained, and exceptions taken.

The question was also raised, as already referred to by the claimant making an offer to prove certain facts. This offer to prove is shown on pp. 49-57 of the record. Exceptions were duly taken to the ruling of the commissioners of appraisal, sustaining the defendant's-in-error objections to the said offer.

Thereafter, when the commissioners of appraisal made their report, the claimant raised this question in the written objections which he filed to the said report. These written objections set forth (pages 87, 89):

"1. That the award of \$3300 made by the said Commissioners of Appraisal for this property, is grossly inadequate.

"2. That the Commissioners proceeded on an erroneous theory in valuing the said property, and excluded and did not consider in making their award, proper and material evidence bearing on the market value of this property which the claimant offered to introduce which would show that this property was a part of a natural

reservoir site, and its market value by reason of this fact was much enhanced.

"3. That the Commissioners erred in refusing to receive and consider evidence offered by the claimant to show the market value of this property as a part of a reservoir site.

"4. That the Commissioners adopted an erroneous theory of damages in valuing this property, in that they refused to consider its chief element of value, to wit, that the property was a part of a natural reservoir site.

"4a. That the Commissioners erred in refusing to receive and consider the evidence showing the availability and adaptability of this parcel for reservoir purposes.

"5. That by the erroneous theory of valuation adopted by the Commissioners, claimant has been deprived of his property, without due process of law and without just compensation, in violation of the United States Constitution.

"6. That by the erroneous theory of valuation adopted by the Commissioners, claimant has been deprived of his property without due process of law and without just compensation in violation of the Constitution of the State of New York.

"7. That the Commissioners erred in failing to make compensation to the claimant for the rights he had to combine with the owners of those contiguous parcels of land which together constituted a reservoir site, in offering for sale, using, or selling the whole of the said site to intending purchasers in the open market, and in thereby obtaining a greatly enhanced value for his property, and also for the rights which he had of combining with the said owners, in building or causing to be constructed a reservoir or reservoirs on all or parts of the said property, including this parcel of land, which rights were taken away by Chapter 724

of the Laws of 1905, and the acts amendatory thereof and supplemental thereto, and particularly by Section 3 of the said act, and by other provisions of the said laws.

"8. That the Commissioners erred in refusing to receive and consider evidence which was offered to show the most advantageous use to which this property could be put, and the said Commissioners, in making their award, did not take into consideration, the most advantageous uses to which this property could be put.

"10. That the Commissioners erred in refusing to receive and consider evidence of the structural value of the buildings erected upon this parcel.

"15. That the words 'just and equitable compensation' as used in the act under which this proceeding was instituted, mean all loss, damage or expense direct or consequential suffered by the claimant, and the Commissioners erred in refusing to so construe the said act.

"16. That if the words 'just and equitable compensation' do not include all loss, damage or expense direct or consequential, suffered by the claimant, the act under which these proceedings are carried on, is unconstitutional, and violates Article 1, Section 1, and Article 1, Section 6, of the Constitution of the State of New York, in that it deprives this claimant of the equal protection of the laws and deprives him of the rights and privileges secured to railroad corporations under Section 13 of the act under which this proceeding is being carried on, and deprives claimant of his property without due process of law, and without just compensation, and also violates Article 1 of the 14th amendment of the Constitution of the United States, for the same reason.

"Wherefore, claimant asks that the award herein may be set aside, and that the court may refuse to confirm the report of the said Com-

missioners, and that the same may be sent back to the same or other Commissioners."

The federal question herein involved was, also, urged, both in oral argument, and upon the written briefs of the claimant, before the Special Term and the Appellate Division of the State Supreme Court, and before the Court of Appeals of said State, and this question was raised in every manner in which the claimant could raise the same.

The offer to prove, which the claimant made before the commissioners of appraisal, and which was rejected by them, is as follows (page 45, fols. 66-67, pages 50-57, fols. 74-87):

"Q. Was there a demand for an additional supply of water existing on the part of the City of New York and has it existed for the last ten years or more?

"Mr. Linson: I object to that upon the grounds:

"First, it is immaterial.

"Second, that it is incompetent.

"Third, that it is irrelevant.

"Fourth, that it is improper.

"Fifth, that it appears from the record upon which the Commission was appointed, and which is a part of the record before the Court, that there was such a demand, and that the officers charged with the duty of procuring an additional supply of pure and wholesome water, after due investigation and examination, selected the reservoir site in question as being the site of a reservoir for the purpose of supplying such pure and wholesome water to the City of New York, wherefore such a demand and such adaptability is conclusively presumed in this proceeding, and is not a subject of testimony which can neither add to nor subtract from such presumption. * * *

"Mr. Alexander: I offer to prove that the watershed of the Esopus contains a reservoir site known as the Ashokan reservoir site, a part of which this Commission is now condemning. That this reservoir site is the most valuable reservoir site within the State of New York. That this reservoir site is a natural basin located at an elevation of 600 feet above the sea level. That through this reservoir site runs a stream known as the Esopus, a never-failing stream, which contains pure drinking water of a hardness of 20 only; and that this water of the Esopus running through this watershed, and particularly through the Ashokan reservoir site, is needed and is absolutely necessary to temper the water furnished by the Croton watershed, which has a hardness of 40. That it is absolutely necessary for the City of New York to obtain also the waters from Jansen Kill and Wappingers Creek, on the easterly side of the Hudson River, in Dutchess County, and that these waters have a hardness of 90, and cannot be available to the inhabitants of the City of New York as drinking water without their being tempered by mixing the waters of the Esopus with those waters, making the Ashokan reservoir site particularly valuable to the inhabitants of New York City in this respect.

"I also offer to prove that along the valley of the Hudson River, from Albany to New York City, are many growing cities, towns and villages whose inhabitants need an additional supply at present and in the immediate future of pure and wholesome water, and that they can obtain a supply more cheaply from a reservoir to be constructed by damming up the Esopus and impounding the waters of the Esopus in the Ashokan reservoir site than they can from any other sources in the State of New York.

"I offer also to prove that this particular parcel of land, known as No. 246, has a storage capacity for water and could in itself, with-

out any adjoining lands, be used as a reservoir.

"I offer also to prove that this particular reservoir site of all reservoir sites in the three watersheds, the Esopus watershed, the Schoharie watershed and the Rondout watershed, is alone of sufficient capacity to hold the entire yield and run off of the Esopus watershed, and I also offer to prove that there are no other reservoir sites within the Esopus watershed which are sufficient in size, capacity, character or quality to hold the yield or run off of the Esopus watershed.

"I also offer to prove that this particular parcel of land is a part of and absolutely necessary to the constructions of the reservoir in the Ashokan reservoir site, and that the Ashokan reservoir could not be constructed without taking in this particular parcel of land.

"I also offer to prove that the population of the City of New York and of its boroughs is growing very rapidly. That Yonkers, White Plains, Poughkeepsie, Albany, and many other cities along the Hudson are growing very rapidly in population. That at present these cities use one hundred million gallons per day of pure and wholesome water, and that there is constant demand for more water.

"I also offer to prove that under the Act the City of New York has a right to sell the water at a profit from this very reservoir.

"I also offer to prove that 'no reservoir, or other structure for the storage or impounding of water, shall at any time be constructed within the drainage area of the Esopus Creek in the County of Ulster, other than that designated in the reports of William H. Burr, Rudolph Her- ing, and John R. Freeman to the Honorable George B. McClellan, Mayor, chairman, board of estimate and apportionment of the City of New York, as to the Ashokan reservoir, the flow line of which shall not exceed elevation six hundred feet coast and geodetic survey datum.' And that this particular parcel of land must

necessarily be included in the construction of that reservoir which at present, by law, must be constructed.

"I also offer to prove that this particular parcel of land in and by itself has a market value as being a part of the great Ashokan reservoir site.

"I also offer to prove that it would cost the City of New York at least double the amount that it is now expending to obtain the necessary supply of pure and wholesome water from any other source, and that this particular source is the cheapest source.

"I also offer to prove that: 'Watersheds possessing the highest degree of availability for increasing the water supply of the City must, obviously, be so located as to require the least amount of construction work to bring the water into the distributing system. The watershed of Fishkill Creek fulfills this condition. The chief difficulty to be overcome in securing the Fishkill waters, or those still further north, and that which controls the shortest time in which a new supply can be obtained, is the large amount of tunnel construction for the aqueduct through the rough mountainous region lying between it and the Croton shed.'

"I also offer to prove that: 'The upper watershed of the Esopus Creek lies on the southeasterly slope of the Catskill Mountains, and no limestone is found in all its area. That its waters, therefore, are of unusual softness.' That at a point called Olive Bridge on the Esopus, about thirteen miles westerly from Kingston, there is the best dam site in any watershed for a large reservoir, known as the Ashokan reservoir site. That this dam site is an excellent dam site for a larger reservoir, known as the Ashokan, than ever yet constructed for storage purposes in connection with municipal water supply.

"I also offer to prove that at present the inhabitants of the City of New York, known as Greater New York, are receiving from all their

sources of water supply two hundred twenty million gallons of water per day, or thereabouts.

"That the water which can be impounded in the Ashokan reservoir will furnish to the inhabitants of the City of New York five hundred million gallons of water per day.

"I also offer to prove that the Esopus watershed 'is characterized by extensive steep mountainous slopes and wooded areas of such character that it is safe to estimate its yielding capacity in connection with this reservoir at one million gallons per square mile per day.'

"I also offer to prove that the Ashokan reservoir site is the only site in any watershed, and in the State of New York for a reservoir which will not only store the entire yield and drainage of the Esopus watershed, but a part of the yield of the Schoharie and Rondout watersheds.

"I also offer to prove that the watershed of the Rondout and Schoharie, the two contiguous watersheds, are free from limestone and that they are covered with a hard slate.

"I also offer to prove that 'the available yield of a watershed is also largely dependent upon the storage capacity or volume which can be developed in it, as the storage reservoirs must hold the surplus flood and other waters until they are needed in seasons of low water.' The storage capacity of each watershed, of the following watershed, which I shall name has been definitely determined, and that the Fishkill watershed has an area of 153 square miles and stores 52,680,000,000 gallons; that the Wappinger Creek has an area of 172 square miles and a storage of 52,200,000,000 gallons; that the Jansen Kill has an area of 149 square miles and stores 17,150,000,000 gallons; that the Esopus has an area of 255 square miles and stores, as estimated here, 101,556,000,000 gallons; that the Schoharie has an area of 228 square miles and stores 65,585,000,000 gallons; that the Rondout has an area of 131 square

miles and stores 20,531,000,000 gallons; that the Catskill watershed has an area of 163 square miles and stores 24,488,000,000 gallons.

I also offer to show the rates of yield as follows: The Fishkill watershed will yield approximately 60,000,000 gallons per day. The Esopus watershed in and of itself will yield 255,000,000 gallons per day. The Rondout watershed, which I offer to show will be diverted or may be diverted into the Ashokan reservoir basin, will yield 98,000,000 gallons of water per day. The Wappinger Creek watershed will only furnish 67,500,000 gallons per day, and the Jansen Kill 112,000,000 gallons per day.

"I offer also to show that it is not advisable to construct a large number of relatively small reservoirs because small and shallow reservoirs would be not only more expensive to the City of New York, but they are easily affected by organic growths, producing disagreeable tastes and odors, and that small reservoirs would not only be more expensive, but also would be sensitive to the influence of vegetation, swampy areas and other prejudicial features of reservoir sites. That furthermore, water passes through a small reservoir in a comparatively short time, so that the sterilizing effect of lying in a large reservoir for a long period is lost. Reservoirs of great capacity, with their increased depth and greater volume of storage are far less affected by organic growths or by other more or less prejudicial effects in smaller volumes of water. The time required for the passage of water through a great reservoir has a most important influence in sterilizing the water, as most of the pathogenic bacteria in the water of a storage basin will die in two or four weeks.

"I also offer to prove that the beneficial effects of the storage of water in reservoirs of great capacity are entirely too pronounced to be ignored, and it is absolutely necessary for the

City to have the Ashokan reservoir site above all others, both for reasons of great economy and for the health and safety of the inhabitants of the City.

"I also offer to prove that it is necessary for the other cities along the Hudson River to buy the water from this reservoir basin, both by reason of economy and on account of the protection of the health, life and safety of their citizens.

"I also offer to show that it is absolutely necessary for the City of New York, in the immediate future, to obtain a reservoir site with a supply of water equal to at least 500,000,000 gallons per day.

"I also offer to prove that the waters of the Esopus and Rondout Creeks are exceptionally desirable for public supply, and that they are the best waters that are available in any direction for an additional supply of water either to New York City or to any other cities, towns, and villages along the Hudson River.

"I also offer to prove that the excellent character of the Esopus and Rondout waters renders highly improbable any temporary prejudicial characteristics and that it is desirable both for the inhabitants of New York City and the inhabitants of all other cities along the Hudson River to control the mingling of such waters with others of less excellent quality to prevent the tastes and odors which develop in the other waters of the state which are now used for drinking purposes by the inhabitants of the various cities.

"I also offer to prove that the waters of the Esopus are the most quickly available for a source of water supply either to New York City, Yonkers, Albany or other cities.

"I also offer to prove that the Ashokan reservoir site has the great advantage of a higher elevation than any other reservoir site of equal storage capacity in the State of New York. That on account of the elevation of this reser-

voir site the water will flow from it by the force of gravity, thus obviating the enormous expense entailed by pumping water up into the high office buildings and other places in the City of New York, Yonkers, and all other places along the Hudson River. And that the waters of the Esopus which run through the Ashokan reservoir site are of such a degree of softness that millions of dollars per annum will be saved to the inhabitants of New York City, Yonkers, and other cities and villages along the Hudson River by reason of the fact that these waters will not cause boilers in the cities to be covered with mineral matter and will not necessitate the cleaning of boilers which the water at present used by these various cities now cause by the incrustation.

"I also offer to prove that this particular reservoir site, the Ashokan reservoir site, has many elements of value, such as the slope of the sides, which slope very perceptibly makes the run-off of the watershed much more rapid than any other watershed.

"I also offer to prove that other reservoir sites now being used by the City of New York and other cities are at a comparative low elevation, most of them being from about 200 to 250 feet above the sea level, necessitating in many cases a very large expense for pumping the waters which flow from these reservoirs.

"I also offer to prove that it is necessary for the fire departments of the various cities along the Hudson, and of the City of New York, to get a great head on, and the waters flowing from this particular reservoir site will flow so rapidly by force of gravity that this particular site is of enormous value generally in the open market, and, therefore, that all parts of this site are of considerable value other than as farm land.

"I also offer to prove that the supply from this reservoir site will not be temporary, but may be used for all time and will be just as

permanent as the Croton water supply has been. That the City of New York, in the language of Mr. J. Waldo Smith, Chief Engineer, who is the witness now on the stand, 'has reached the limit of the Croton supply and is going to do just what it did before, reach out and try to take the nearest source of supply, and the one that is the best and purest and cheapest. That it is just as permanent as the Adirondacks, and it will be far cheaper; it will be better; and the City is going to get it a great deal quicker—and that is most important of all.' That 'this seemed to be the only place left for the City to get water.' That in the opinion of Mr. Smith, using his language, 'I believe it is the only place, and I believe it is the best place.'

"I also offer to prove that 'the minimum flow of the Hudson River at Poughkeepsie is eight hundred to a thousand million gallons a day. That point is only a little above the influence of salt water, and if water be taken there reservoirs must be built to compensate the flow, or there would be salt water in the pipes.'

"I also offer to prove that the supply from the upper Hudson, polluted as it is, would cost the City more than the Catskill water. That 'there is no instance in this country,' in the language of Mr. Smith, 'where a city has taken a polluted supply and filtered it, if an unpolluted supply was available at a reasonable cost.'

"I also offer to prove that there has been a demand both on the part of the City of New York and other cities for an additional supply, and also a demand for reservoir site property.

"I also offer to prove that there has been a demand on the part of the State of New York for reservoir site property for the purpose of furnishing the State a water supply.

"I also offer to prove that that subject has not only been agitated but discussed, and the State of New York, through its Board of Water Supply, that is, the State Board of Water Supply, is now considering the subject

of obtaining a reservoir site for the purpose of furnishing water to a large number of other cities in the northern part of the State of New York and elsewhere in the State of New York.

"I also offer to prove that the Ashokan reservoir site, which the City of New York is now condemning, has an intrinsic value of \$34,000,000, and that it has a fair and reasonable market value of at least \$14,000,000.

"I offer to prove that private capital, by constructing this reservoir and impounding the waters of the Esopus at this point and doing just what the City of New York is now doing, could make a net profit, by selling these waters to the inhabitants of the City of New York and to the inhabitants of Yonkers and other cities along the Hudson River, of \$20,000,000 per year.

"I offer to prove that the complete cost of construction of a reservoir of the capacity that the City of New York contemplates building with the necessary aqueducts, etc., to furnish water to the inhabitants of New York City and to the inhabitants of the other cities mentioned in the act, would be \$162,000,000.

"I offer to prove that the nearest available sources of water supply next to the Esopus watershed are the Rondout and Schoharie watersheds, and that it would cost double the amount of money to take water from the Schoharie and Rondout watersheds and furnish it to the farthest city in the State whose inhabitants would be customers for this water.

"I also offer to prove the fair and reasonable market value of this particular piece of property, known as parcel No. 246, taking into consideration the most advantageous use to which it may be put.

"I also offer to prove that the most advantageous use to which this particular parcel of property may be put is to use it as part of a reservoir for the storage of pure and wholesome drinking water.

"I also offer to prove that this particular parcel of land, in conjunction with contiguous parcels of land, constitutes a reservoir site, and that many reservoirs of different capacities may be constructed on this particular parcel of land and on other parcels of land contiguous to it, and that it is not absolutely necessary to construct a reservoir of a storage capacity equal to that which the City of New York is now constructing. I also offer to prove that not long since the City of Kingston actually had before its consideration taking a part of this very reservoir site for the purpose of constructing a reservoir to supply an additional supply of water to the inhabitants of the City of Kingston.

"I also offer to prove that a demand exists on the part of the inhabitants of the City of Kingston for an additional supply of pure and wholesome water.

"I also offer to prove that this particular reservoir site, and the particular parcel of land known as No. 246, which is now before this Commission for consideration, may be used as a storage reservoir for the purpose of furnishing electrical and other power to the inhabitants of the various cities, towns and villages not only along the Hudson, but all over the State of New York and elsewhere.

"I also offer to prove that this Ashokan reservoir site is an ideal site, containing all the essentials for a storage reservoir which would furnish enormous electrical power, and that such an enterprise could be carried out at an enormous profit, even at a much greater profit than by using this reservoir site to construct a storage reservoir for the purpose of furnishing an additional supply of pure and wholesome water.

"Furthermore. I offer to prove all of the capabilities possessed by this particular parcel of land and possessed by the reservoir site of which it is part.

"Lastly, I offer to prove the fair and reasonable market value of this particular parcel of land, taking into consideration all of the elements of value comprised in it, including that element of value on account of its natural location and conformation as part and parcel of a natural reservoir site of enormous value.

"The Chairman: This you make as one continuous offer so that you can raise the entire question?

"Mr. Alexander: I would like a ruling on each separate fact.

"The Chairman: We reject the offer and exclude it.

"Mr. Alexander: I except. May I have that rejected as to each fact?

"The Chairman: It is possible that it might be competent to prove some one fact. I do not know. I suppose when a man makes an offer he intends to prove every part of it. You were told and I supposed, and I suppose still, that you would not make any offer which you would not prove. Now if you consider all this evidence as competent and material you have an exception to it and to every part of it, if you want it.

"Mr. Alexander: I want an exception to each fact offered by me to be proved in that offer.

"I understand your Honor rules out every fact that I offer to prove in that offer.

"The Chairman: We reject this offer as now made, and we will give you an exception.

"Mr. Alexander: Then I will ask the stenographer to read the first part of this offer.

"The Chairman: I will not rule upon it in that way. You can make your offer separately, if you desire to.

"Mr. Alexander: I offer to prove the fair and reasonable market value of this piece of property, taking into consideration that element of value which gives it an enhanced value because it is part of a natural reservoir site.

"The Chairman: That we exclude."

"Mr. Alexander: I except. I offer to prove the fair and reasonable market value of the Ashokan reservoir site which the City of New York is now condemning."

"The Chairman: We will exclude that."

"Mr. Alexander: I except."

"The Chairman: I assume your objection goes to this offer?"

"Mr. Linson: I should certainly object to the evidence if it were offered."

"The Chairman: You object to this offer?"

"Mr. Linson: Yes, I interpose to the offer the same objection upon which your Honor ruled."

"Mr. Alexander: I have assumed there was an objection."

"Mr. Linson: To each of these offers."

"The Chairman: All these offers are objected to, and the whole offer is objected to, and the rulings are upon the objection."

"Mr. Alexander: I offer to prove that the Ashokan reservoir site is the cheapest, best and most available site for the purpose of enabling any customers for water to obtain an additional supply of pure and wholesome water."

"The Chairman: I will exclude that."

"Mr. Alexander: I except. I offer to show that the Ashokan reservoir site, that the City of New York is now condemning, has a fair and reasonable market value in the open market."

"Mr. Chairman: We will exclude that under the circumstances of this case."

"Mr. Alexander: I except. I renew my offer and make each part of the first offer which I made a separate and distinct offer to prove each and every fact therein contained."

"The Chairman: We decline to rule upon that in any other way than we have already ruled."

"Mr. Alexander: I except."

A specification of the errors relied upon by the plaintiff in error, is contained in the plaintiff's assignment of errors (record pp. 126-128) numbered respectively from 1 to 6 inclusive, and 9 and 10, which are as follows:

"1. That in violation of the fourteenth amendment of the Constitution of the United States, the Commissioners of Appraisal duly appointed herein by the Supreme Court of the State of New York, deprived the said James P. McGovern of the parcel of land known as parcel No. 246 in Section No. 6 of the Ashokan Reservoir, of which he was the owner in fee, without due process of law and without just compensation by excluding and refusing to consider evidence against the exception of the claimant and plaintiff-in-error, to prove the market value of said parcel No. 246 in Section No. 6 of the Ashokan Reservoir, owned in fee by the said James P. McGovern, which the plaintiff-in-error offered to introduce, which evidence would have shown that the said parcel of land was part of a natural reservoir site, and by reason of such fact, the value of the said property was much greater than that of ordinary agricultural land, similarly situated, not suitable or adaptable for reservoir purposes, and was much greater than the award made to this claimant for said property.

"2. That in violation of the fourteenth amendment of the Constitution of the United States, the Supreme Court of the State of New York and the Court of Appeals of the State of New York deprived the said James P. McGovern of the parcel of land known as Parcel No. 246, Section 6, of the Ashokan Reservoir, of which he was the owner in fee, without due process of law and without just compensation, by confirming and affirming the report of the said Commissioners of Appraisal, and the award made therein, although the said Commis-

sioners excluded and refused to permit to be introduced and refused to consider proper and competent evidence which would have shown that the said parcel No. 246 in Section No. 6 of the Ashokan Reservoir owned by the claimant below and the plaintiff-in-error here was part of a natural reservoir site, and there was a demand for such sites, and by reason of such facts, the value of the property was much greater than ordinary agricultural land similarly situated, not suitable or adaptable for reservoir purposes, and the value was much greater than the award made to this claimant for said property.

"That the aforesaid State Courts and the aforesaid Commissioners of Appraisal erred in refusing to receive or consider evidence which was offered to show the most advantageous use to which this property could be put; in refusing to take into consideration, in awarding damages for the taking of said parcel No. 246 in Section No. 6, as evidence of the market value of the property, the most advantageous uses to which the said parcel of land could be put, thereby depriving the plaintiff-in-error of his property without due process of law, and without just compensation, in violation of the fourteenth amendment of the United States Constitution.

"4. That in violation of the fifth and fourteenth amendments of the Constitution of the United States, the Commissioners of Appraisal refused to receive and consider any evidence of the structural value of the buildings erected upon the said parcel of land known as parcel No. 246 in Section No. 6 of the Ashokan Reservoir, at the time when the City of New York took title to the same, and thereby deprive the said James P. McGovern of his property without due process of law, without just compensation and of the equal protection of the law,

as Chapter 724 of the Laws of 1905, under which this proceeding was instituted, in Sections 13 and 25 provides that railroad corporations and persons or corporations owning property used for railroad, highway or other public purposes shall be paid all losses, damage and expense resulting to such persons or corporation, and by the ruling of the said Commissioners of Appraisal, the plaintiff-in-error herein was deprived of the equal protection of the law, in that he was not allowed all his loss, damage or expense for the structures erected upon his said property.

"5. That in violation of the fifth and fourteenth amendments of the Constitution of the United States, the aforesaid Supreme Court of the State of New York, and the Court of Appeals of the State of New York, deprived the plaintiff-in-error herein and the claimant below of his property without due process of law, without just compensation, and deprived him of the equal protection of the law, by confirming and affirming the report of the Commissioners of Appraisal, refusing as hereinbefore mentioned, to receive, and in refusing to consider any evidence of the structural value of the buildings erected upon said parcel of land, at the time the City of New York became vested with the title to the same.

"6. That the said State Court and the Commissioners of Appraisal violated the fourteenth amendment of the Constitution of the United States, by failing to make any award to the claimant and plaintiff-in-error for the damages done to the parcel of land of which parcel No. 246 in Section 6 is a part, which said parcel was not taken by the City of New York, defendant-in-error herein, although the uncontradicted evidence was that the claimant and plaintiff-in-error suffered damage by reason of the taking of parcel No. 246 in Section No. 6.

"9. That the aforesaid State Courts and the aforesaid Commissioners of Appraisal in construing the words 'just and equitable compensation' as used in the act under which this proceeding was instituted, not to mean all loss, damage or expense direct or consequential, suffered by this claimant and plaintiff-in-error, deprived this claimant of his property without due process of law and without just compensation in violation of the fourteenth amendment of the Constitution of the United States, and denied to this claimant, the same right to compensation given to railroad and other corporations, and applied to this claimant's property, a different rule of compensation from that which the aforesaid condemnation act, being Chapter 724 of the Laws of 1905, expressly provides in favor of railroad and other corporations under Sections 13 and 25 thereof, and thereby deprives this claimant and plaintiff-in-error of the rights and privileges secured to the railroad and other corporations who own a part of the said property to be condemned pursuant to the provisions of the said act, in violation of the fifth and fourteenth amendments of the Constitution of the United States.

"10. That Chapter 724 of the Laws of 1905 of the State of New York, being the act under which the property of this claimant and plaintiff-in-error has been condemned by the aforesaid State Courts and the aforesaid Commissioners of Appraisal, as construed by the said State Courts and the said Commissioners of Appraisal in this proceeding, confiscates the property of this claimant, and the said act as construed by the said State Courts is unconstitutional and void, and is in violation of the fifth and fourteenth amendments of the United States Constitution."

The judgment and orders of the courts of the State of New York are erroneous, in that they deprive the plaintiff-in-error entirely of the chief element of value in his property, thereby confiscating his property in violation of the United States Constitution.

Argument and Points.

Importance of Question Involved.

The particular question involved in this appeal is of great importance, not only to the plaintiff-in-error, but it is also a matter of large public importance. The conservation of water for public use and benefit, is a matter of constantly and rapidly growing concern. It is engaging the attention, not only of the States, but of the Federal Government.

The storage of water for potable purposes; for irrigation, for the use of farmers and gardeners; for cities, villages and also for industrial purposes, is certain of great future increase, and will frequently require the appropriation of large tracts of land whose ownership will be divided amongst a number of persons. Hence, it is of great importance to have settled the principles upon which the owners of such lands throughout the whole country are to be awarded compensation, and the elements to be taken into consideration in determining the value of their lands.

Not only will the decision of this court apply to the conservation of water for public or private use, but it will apply equally to the conservation of other natural resources, and consequently the decision of this court in this case will necessarily affect the value of tremendous amounts of valuable properties throughout the whole country.

For the convenience of the court, we have set forth, alphabetically arranged, as an appendix attached to this brief, a large number of cases in the United States and England, bearing upon the question arising in this case, to some of which the attention of the court will hereafter be particularly directed.

FIRST POINT.

The Commissioners of Appraisal, and the Courts of the State of New York, confiscated the claimant's property in entirely excluding from consideration, as an element of value, its adaptability for use as part of a reservoir site.

The plaintiff-in-error is entitled to have his interest in the Ashokan Reservoir Site valued upon a consideration of all the uses for which his property is available and adaptable, *i e.*, upon a consideration of all of the uses to which it might reasonably and profitably be put by any one. The uses which he or his grantor had made, or were making of the property, or which he or they at any time hereafter might be capable of making of it, is a wholly unimportant consideration. The principles of law which govern the proper determination of this case, are elementary and well established.

The Courts of the State of New York have expressly overruled the decision of this court in *Boom Co. vs. Patterson*, 98 U. S., 403. This case was the

main authority relied upon by the plaintiff-in-error in the State Courts. The Hon. John J. Linson, the learned special counsel for the City of New York, who argued this case before the State Courts, admitted, both upon his oral arguments and upon the briefs which he filed, that if the Boom Co. case applied, it should not be followed, because it was not sound law. To use the language of the learned counsel himself, taken from pp. 36 and 37 of his brief before the Appellate Division of the State of New York, we quote the following:

"Both the cases cited while not in line with the best authority—the latter case having been practically overruled in the Matter of Daly, 72 App. Div., 394—present special adaptability within the definition hereinbefore given."

Neither the Special Term nor the Appellate Division of the State Court saw fit to refer, in their opinions to the Boom Co. vs. Patterson, although the plaintiff-in-error cited that case as the main authority upon which he relied, and strongly urged it upon the State Courts.

About three months after, the decision of the New York Court of Appeals in this case, the same court, in another case, reversed itself on the question of structural value, one of the questions involved in this case, which it, also, decided against this claimant. The Court of Appeals in this case prohibited the plaintiff-in-error from introducing evidence to prove the value of the buildings and other structures on his premises. Three months later, it decided evidence of structural value was admissible.

Since the decision of the New York Court of Appeals, this same question of reservoir adaptability arose in the United States Circuit Court, for the

Southern District of New York (now District Court) before the Hon. E. Henry Lacombe, in a case where Mr. William Sage, Jr., an owner of a part of the Ashokan Reservoir Site, removed his claim from the State Courts into the Federal Court, on the ground of diversity of citizenship, and the opinion of Judge Lacombe, confirming the report of the Commissioners of Appraisal in that case, is as follows:

Decision of Judge Lacombe Confirming Report.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

The Application to condemn land
in Ulster County, New York,
for Ashokan Dam and Reser-
voir;

WILLIAM SAGE, JR.,
Claimant.

LACOMBE, C. J.:

The proceeding affecting property of this claimant was removed to this court by reason of diversity of citizenship.

The Commissioners made an award of \$7,624.45 for the land and buildings of claimant's parcel and

the further sum of \$4,024.45 for reservoir availability and adaptability. The City of New York moves to confirm the report as to the \$7,624.45 only, contending that there should be no award for reservoir availability. The claimant moves to send back on the ground that the amount awarded for reservoir availability is wholly inadequate.

So far as the latter matter is concerned, it appears that the evidence is of such a character that the Court is not disposed to disturb the conclusion reached by the Commissioners any more than it would an award of a like amount by a jury predicated on such testimony. This motion is therefore denied.

The evidence shows that the land in question, together with that of claimant's neighbors, was available as a reservoir site, and that such availability was not confined to the uses of New York City. Apparently the award is not made on the basis of the value of the reservoir lands to the City of New York alone; had such been the basis the valuation would have been very much higher. But the Commissioners have taken into consideration as an element of value the circumstance that, had New York City never gone to this watershed, some other political community or some water company created by statute might have been willing to pay more than their value as farming land for the parcels which would enable it to impound water there. Under *Boom Co. vs. Patterson*, 98 U. S., 403, this was a proper method of determining value.

An interesting point is raised: Whether since the decisions of the State Courts are not in accord with those of the Federal Courts on that subject (*In re Ashokan Reservoir*, 130 App. Div., 350, 352, 357, of which the McGovern claim was affirmed by the New

York Court of Appeals without opinion) comity should not require the latter courts to follow state decisions. This question is about to be presented to the United States Supreme Court in the McGovern case which has been taken to that tribunal. In view of this circumstance it is unnecessary to discuss that question here. The principle laid down here in Boom Co. vs. Patterson, *supra*, will be followed and the entire report of the Commissioners confirmed. Presumably before this decision comes up for review at the next term of the U. S. Circuit Court of Appeals a decision of the United States Supreme Court (in the McGovern case) will dispose of the question.

Report as to claimant's parcel is confirmed.
Filed Oct. 4, 1911.

In the Sage case, the claimant proved all of the facts which Mr. McGovern, the plaintiff-in-error, offered to prove in this case now before this court.

The Sage case is regarded by the plaintiff-in-error as an authority in his favor in this case, and the plaintiff-in-error will later on in this brief refer to the transcript of record in the Sage case, for the purpose of showing the court what facts were actually proved in that case, and how the principle of law laid down in the Boom Co. vs. Patterson is applicable to the facts found.

Before, however, discussing at length any of the legal authorities, which the plaintiff-in-error conceives govern and control the decision of the court in this case, a number of general principles will be briefly referred to, which should at all times be in the court's mind in deciding the case at bar.

When a state deprives an individual member of society of his property, against his will, it is expressly

decreed in the state constitutions and in the Constitution of the United States, that the owner of the property shall receive "just compensation" therefor. When the fee simple of property is taken by force of the power of eminent domain, the courts have determined "just compensation" to mean the fair and full money value of the property taken; and it has been determined in a general way that this value of the property taken means its "market value." What does "market value" mean, how shall "market value" be determined, what does "market value" include?

It is very simple to say, in general language, that "market value" means the amount of money which the property condemned will bring in the open market at voluntary sale.

As this Court said, in *Wetmore vs. Rymer*, 169 U. S., 115-128:

"It is well known that there is no matter, in respect to which the judgments of men more widely differ, than in regard to the value of real estate. * * * It is unnecessary to quote authorities, to show that in estimating the market value of land, everything which gives it intrinsic value is a proper element for consideration; not only its present use, but its capabilities are to be considered."

There is no "market value," in the strict sense of the term, for real estate, and especially for country real estate, in the sense that there is "market value" for stocks, bonds and produce. "A lot of land cannot have a market value, in that sense of the word." *Sargent vs. Town of Merrimac*, 196 Mass., 171.

There is a line of decisions in the Courts of New York State, holding that the courts will not set aside awards of Commissioners of Appraisal in eminent domain proceedings, although the awards may be in-

adequate. The New York State Courts hold that an award must be so inadequate that it is shocking to the sense of justice, before they will set it aside.

In *Flynn vs. City of Brooklyn*, 19 App. Div., 602, Cullen, J., said:

"The rule has been so often reiterated, that an award of commissioners of appraisal will not be set aside for inadequacy or as excessive, unless the award is so palpably wrong, as to shock the sense of justice, that it is not necessary to cite any authorities in its support."

See also:

Long Island R. R. Co. vs. Reilly, 89 App. Div., 166.

This rule has been adopted by the New York State Courts, in the face of the express language of both the State and the United States Constitutions, that wherever a man is deprived of his property by the public, he must receive "just compensation" therefor.

It is self evident that if an award is inadequate, even though it is not so inadequate that it is shocking to the sense of justice, it is, nevertheless, not "just compensation." Only an adequate award is "just compensation."

In the case at bar, however, the State Courts have ruled, not, that the plaintiff in error is entitled to some compensation, by reason of his property being part of a natural reservoir site, not that the plaintiff-in-error is entitled to an inadequate compensation for this element of value in his property, but that he is entitled to no compensation; nay, more, that he has not even the right to introduce the slightest particle of evidence to prove that this element of value in his property exists.

In other words, the State Courts have wholly, en-

tirely and completely confiscated the claimant's property.

It is well settled law in the State of New York, that where, in an action pending before its Courts, a complaint is dismissed, or a verdict directed against a party, the latter is not only entitled to the most favorable inferences deducible from the evidence, but all of the disputed facts are to be treated, as established in his favor.

Higgins vs. Eagleton, 155 N. Y., 466.

Place vs. N. Y. C. & H., 167 *id.*, 345, 347.

Waldron vs. Fargo, 170 *id.*, 130.

Sondheimer vs. City of N. Y., 176 *id.*, 485.

Applying this principle to the case at bar, it will follow that everything which the plaintiff-in-error offered to prove before the Commissioners of Appraisal, must be regarded as having been proved.

It is true that the owner of property taken by force of the power of eminent domain, is not entitled to more than "just compensation;" that the amount of money to be awarded to him is not the value of his property to the condemning party, and that the owner is not entitled to have the valuation measured by the benefits to be bestowed upon the property by the condemning party, after the latter has acquired it.

It is unnecessary to cite authorities for the well established principle of law, which the plaintiff-in-error admits, that the owner is not permitted to take advantage of the necessities of the condemning party.

It is unnecessary to cite authorities for the equally well settled principle of law, equally admitted by the plaintiff-in-error, that the owner is entitled to have the value of his property considered, with reference to its adaptability for any and all uses to which it may be devoted, and that:

"If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is practically adapted to some particular use, all the circumstances which make up its adaptability may be shown, and the fact of such adaptability may be taken into consideration in estimating the compensation."

Lewis on Eminent Domain, Sec. 479.

It should, also, be observed that Commissioners of Appraisal are not a jury, and are not liable to be influenced in the same manner as a jury. They are selected by the court, are presumably men of experience, although they may not be familiar with the particular property taken and may not be experienced real estate experts; and they have the right to acquire information, not only from the evidence introduced by the parties to the litigation, but from all outside sources that a prudent man would naturally inquire into before purchasing the property.

The same reason, therefore, for the enforcement of strict rules of evidence, does not exist before Commissioners of Appraisal, as that which exists where a jury is sitting.

Furthermore, it is unnecessary to cite authorities for the proposition that the value of real estate in the hands of an owner, means the amount of money which the owner can obtain for the property in the open market. It may be that the owner himself cannot utilize his property for many valuable uses and purposes, to which it may be put by others who are in a better financial position to utilize the property than the owner, and yet, nevertheless, the owner is entitled to all of the elements of value in his property, and it is just as much confiscation, to exclude, elimin-

ate and deprive him of one element of his property, as it is to deprive him of another.

If the adaptability and availability of property for particular profitable commercial uses and purposes adds to its market value, this element of value must be taken into consideration, equally with the enhancement in value of the land which may be due to the existence of a suitable building or other structure thereon.

Let us assume, by way of argument, that a large office building on Wall Street, New York City, was condemned for public purposes; that in the Court proceedings, the owner of the office building offered to prove the value of his building as an element of value in the property, or to put it in another way, that the owner desired to prove the enhancement in value of the land, owing to the office building being upon it. Let us assume further that the Courts excluded entirely from consideration the value of this office building for any purpose, and awarded to the owner merely the value of the vacant land, as it was before the office building had been erected on it. Would this owner be receiving "just compensation"? Would not such an owner be just as effectually deprived of his property, by the Courts, as he would have been had the mob in the streets torn down the office building by sheer physical force?

It cannot be gainsaid that the enhanced value of the claimant's property in this case, by reason of its peculiar adaptability and availability as a component part of a natural reservoir site, is as much an element of value in his property, as the office building was an element of value in the supposititious case to which reference has just been made.

The doctrine that the fitness of lands for particular purposes is an element in estimating their market value is fully supported by this Court in the *Boom Co. vs. Patterson*, 98 U. S., 403, and in other cases. The doctrine of the *Boom Co.* case has been uniformly followed by all of the legal authorities, and by all of the courts in all of the States, wherever we are able to find the question has arisen, saving and excepting the Courts of New York State in the case at bar.

In the *Boom Co. vs. Patterson*, *supra*, which will be frequently referred to later on in this brief, the facts were that the *Boom Co.* was engaged in the lumber business, and was authorized by its charter to construct booms on the Mississippi River. A boom is a natural or artificial enclosure in a stream, suitable for stopping the progress of logs and lumber as they flow down stream and of catching, holding and protecting the same. *Patterson* owned a large part of some islands in the Mississippi River. These islands were about a mile in length and ran parallel with the west bank of the river. The distance between the islands and the river bank, was about an eighth of a mile. The west bank of the river together with these islands, was especially adaptable and available for the construction of a boom. For any other purpose, *Patterson's* property was of little more than nominal value. The *Boom Co.* had a franchise to build booms and to acquire lands for that purpose. *Patterson* had no franchise. There was not a particle of evidence in the entire case from beginning to end, that there had ever been any prior demand for these islands for boom purposes, or that the public mind had become inflamed over the question, or that that had in any way affected the value of these islands.

Apart from the value of these islands for boom purposes, the jury found their value as wild mountain

land to be \$300, but in view of their adaptability for such purpose, the jury gave them an additional value of \$9,058.33. Patterson consented to reduce the verdict to \$5,500 and judgment for that amount was entered in his favor. Sustaining this judgment, the United States Supreme Court said at p. 408:

"The position of the three islands in the Mississippi River fitting them to form in connection with the west bank of the river a boom of immense dimensions capable of holding in safety over 20,000,000 of feet of logs added largely to the value of the land. The Boom Co. would greatly prefer them to more valuable agricultural lands or to lands situated elsewhere on the river as by utilizing them in the manner proposed they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance therefor which the owner had a right to insist upon as an element in estimating the value of his land."

In Sedgewick on Damages, Vol. VI, Sec. 1075, it is said:

"The peculiar fitness of land for particular purposes is an element in estimating its value which may be shown, and when it appears as a fact, in solving the problem of market value. Santa Anna vs. Harlin, 99 Cal., 538; San Diego Land, etc. Co. vs. Neale, 78 Cal., 63; Spring Valley Water Works vs. Drinkhouse, 92 Cal., 528."

In Louisville Ry. Co. vs. Ryan, 64 Miss., 309, the Court sustaining upon appeal a ruling admitting evidence to show the peculiar value of property as a mill site, said:

"Clearly it is of insignificant value for agricultural purposes and there is neither a wharf,

a factory or a sawmill on it, and there may never be, but if its adaptability for these purposes, or any one of them, gives it a present value, the owner is entitled to that value though in fact no one now proposes to use it for any of these purposes."

In *Seattle and Montana Ry. Co. vs. Murphine*, 4 Wash., 448, at pages 456-457, the Court said:

"The market value of property is its value for *any use* to which it may be adapted, and in estimating its value all the uses for which the property is susceptible should be considered, and not merely the condition it may be in at the time and the use to which it may have been put by the owner."

In *Matter of the Staten Island Railroad Co.*, 10 N. Y. State Rep., 393, where land was taken for railroad purposes, it was held error, for the appraisers to exclude from consideration the value of the land, for any and all purposes to which it was suitable. The Court said:

"Any prudent proprietor seeking to decide the price at which he would be willing to part with his estate would be chiefly if not entirely controlled in his decision by the knowledge that his property presented special advantages which would *eventually cause great corporations to struggle for their possession.*"

In *Russell vs. St. Paul, Minneapolis & Manitoba Ry. Co.*, 23 Minn., 210, the Court said, page —:

"Any existing facts which enter into the value in the public and general estimation and tend to influence the minds of sellers and buyers may be considered."

In *Sanitary District vs. Loughran*, 160 Ill., 362, the Court said, page 365:

"It is not denied that the owner was entitled to receive the highest price for which the land could be sold for *any* purpose, nor that if it had a special value by reason of its being stone producing land, the owner is entitled to compensation according to its value as such."

In the case last cited, the petitioner's witnesses valued the property at \$100 per acre as farm land; the owner's witnesses valued it at from \$500 to \$1,000 per acre, because in their opinion quantities of limestone lay under the land. The jury awarded the owners \$250 per acre, and this was sustained by the highest Court.

In *McGroarty vs. Coal Co.*, 212 Pa., 53, the Court held: that the fact that the land had never been plotted or put in the market for building lots, although it should make the jury shy of that element of the damages claimed, does not of itself make its availability for that purpose inadmissible. Any present or proximate use to which land is likely to be put, though not of itself a criterion of damage, is an element of its value and may be proven as such.

In *Paine et al. vs. Kansas and Arkansas Valley R. R. Co.*, 46 Fed. Rep., 546, at 557, the Court said:

"In a proceeding to condemn a site for a railroad bridge evidence to show that the land required for that purpose possessed peculiar advantages as a bridge site is admissible as affecting the question of value. In the case of *Railway Co. vs. McGhee*, 44 Ark., 202, the land appropriated by the railroad company was worthless for habitation or cultivation, but its prospective value for a ferry landing to be established in the future was allowed in the estimate of damages."

In *Amoskeag Company vs. Worcester*, 60 N. H., 522, the Court held proper an instruction that the jury in assessing the damages were to decide how much the market value of defendant's land was lessened by the dam and flashboards; and in determining this they should consider the value of the land in all its parts and elements, its capabilities for agricultural, manufacturing or any other purpose for which it was adapted or likely to be used and all its relations to the whole water power.

In *Harwood vs. The Village of West Randolph*, 64 Vt., 41, the petitioner was the owner of certain large springs the water from which ran in well defined courses across his land. The defendant took these, improved them and used all the water in connection with his water system. Held that the petitioner was entitled by way of damages not merely to the value of the water to him as it was, but also to the value of the springs for the purpose of improvement and development.

In *Gardiner vs. The Inhabitants of Brookline*, 127 Mass., 358, the owner was allowed to show that the soil was especially adapted to the raising of cranberries.

And in *Conness vs. Com.*, 184 Mass., 541, it was held that the value for a special purpose was not the test or measure of market value, yet that it was to be considered in ascertaining the market value.

In *Gage vs. Judson*, 111 Fed. Rep., at page 358, Judge Townsend, writing for the Court, said:

"From the cases taken together it is difficult to deduce any general rule applicable to all situations. Estimates of probable profits from a particular use of the property, contemplated but not yet actual, have been generally excluded."

"Where there is special need for the property for some particular purpose and the property in question is the only one available for that purpose, evidence as to its value for such purpose may perhaps be gone into with more particularity and detail than in ordinary cases; but the extent of such inquiry must be left very much with the tryers. Thus if there had been a special demand for a site for an office building in this locality, and this had been the only available site for that purpose, there would have been more reason for admitting computations of possible profits from such a building."

A very instructive discussion is to be found in the case of *Hooker vs. M. & W. R. R. Co.*, 62 Vermont, 47-8-9.

It has been the uniform rule in this State in ascertaining the value of property taken for a public use that all the capabilities of the property and the uses to which it may be applied, or for which it is adapted, are to be considered, and not merely the condition which it is in at the time and the use to which it is then applied by the owner.

In the *City of Syracuse vs. Stacy*, 45 App. Div., 249-254, the Court said:

"It is equally well settled that in order to ascertain the value of property taken for a public use, the owner is entitled to have such property considered with reference to its adaptability for *any* and all uses to which it may be devoted."

Citing:

Boom Co. vs. Patterson, 98 U. S., 403.
Matter of N. Y., L. & W. R. Co., 27 Hun,
 116.

Matter of Gilroy, 85 Hun, 424.

Benham vs. Dunbar, 103 Mass., 368.

Gardiner vs. Brookline, 127 Mass., 358.

To the same effect:

Matter of Furman Street, 17 Wendell, 649, at page 669.

Trustees of College Point vs. Dennett, 5 T. & C., 217.

Matter of Commissioners, 37 Hun, 537-55.

Matter of Union E. L. R. R. Co., 55 Hun, 163.

Matter of Daly, 72 App. Div., 396.

(A) *In the case at bar, the City is condemning property from which it will derive a commercial profit.* This case is different from that of a public park or public school, or fortification, where the property is condemned, exclusively and solely for public benefit.

The City is here condemning the best, cheapest and most available reservoir site, for the purpose of supplying to its growing population of four and one-half millions of inhabitants, and, to the steadily increasing millions of other cities and communities, along the Hudson valley, a necessity of life, at a large pecuniary profit to itself.

The City is acting in this business, in just the same way that a private water corporation would. Its inhabitants need water. Instead of permitting a private water company to acquire this water supply and to supply all of these inhabitants, at a profit, the City, itself, is going into the business.

This business has two sides, a private side, and a public one. Water is a public utility, as well as a public necessity. It is the subject of purchase and sale, just the same as other merchandise, except, that

there is, in the water business, a minimum of risk, and a maximum of profit, on the investment. The customers are under the control of the City. They must have its wares. They are constantly increasing in numbers. Available reservoir sites are becoming scarcer, as every source of supply is taken out of the market. The demand for water grows continually. Consequently, the price of water is becoming higher, in accordance with the laws of supply and demand, while all the time, the good will of the business is ever increasing on account of the constantly increasing population.

The City secures a safe and profitable business, and one that is certain to become more and more profitable, as time goes on.

The City has customers, *i. e.*, has the demand for this water, and, under the statute, has the absolute right to sell water to its own inhabitants and millions of other customers, at a profit. The demand for this water exists, and is growing with great rapidity. This fact cannot be gainsaid.

The one indispensable factor of the business is the supply. The best and cheapest supply is the Ashokan Reservoir site, together with the streams of pure water, which flow through, and are tributary to it. Without this property, the city cannot enter into this business, except at a loss of hundreds of millions of dollars to itself. With this property, it saves these millions. The source of its profit, is this water supply property. Notwithstanding these undeniable facts, it seriously contends that the owners of this water supply shall not be awarded a cent more, than the value of similar agricultural property, not adaptable or available for water supply purposes. It argues that an allowance of any enhanced value inherent in this prop-

erty, on account of its availability and adaptability for water supply purposes, is necessarily, taking advantage of the City's necessities, and valuing the property, in accordance with the benefits, which the City places upon it.

It is true, that the owners of this site are not entitled to its future value, but its prospective value must be taken into consideration, in order to determine its present inherent value.

In determining the question presented by this appeal, we feel that the Commissioners and the Courts below have been somewhat unconsciously influenced by the idea that if this testimony is admitted, the City of New York will have to pay a much higher sum for the lands. The Court's attention is therefore directed to the fact, that, even if the City of New York pays twice or three times more for these lands than it is now paying under the awards already made, even in that event, the cost of the lands will be only a small item, compared to the amount to be expended. The heavy costs of this proceeding have been not for the lands, but for the other expenses. In fact, it was estimated that up to February 1st, 1909, that the cost of condemnation exceeded the price paid for the lands. If the City should pay \$200 an acre for lands, the total to be paid for this purpose would be only \$3,000,000 whereas the total estimate of the work is \$161,000,000, and yet, without the land located and adaptable as it is, the plan would be impossible. In fact this reservoir site is the foundation of the entire work, the cornerstone of the whole project.

That the use of this property will result in great profits to the City will be conclusively seen by a casual reference to the facts proven in the Sage case. A copy of the transcript of the record in the Sage case is submitted herewith.

It appears from the record in the Sage case, that the first witness called by the claimant was the Hon. Charles N. Chadwick, one of the defendants-in-error, a hostile witness. Mr. Chadwick had been appointed a Commissioner on June 9th, 1905, when the Water Board was first created, and has acted continuously as such from then until now (Sage Record, p. 38, fols. 113-114).

(The references designated hereafter as "S. R." refer to the record in the Sage case.)

Mr. Chadwick paid special attention to a certain extent to the acquiring of land (S. R., fol. 114). He had something to do with the purchasing of property where it was purchased by agreement, but everything was subject to the approval of the Board of Water Supply and also of the Board of Estimate and Apportionment (S. R., fols. 114-115). After having made a study of the conditions surrounding New York City for some years prior to June, 1905, and as far back as 1897, the Commissioner came to the conclusion that the City of New York was badly in need of an additional water supply (S. R., p. 39), and had been in need of additional water for some time (S. R., p. 39).

After a careful investigation, the Board of Water Supply concluded that the best, cheapest and most available source of water supply under all conditions, was the Ashokan Reservoir site and the watershed of Esopus (S. R., p. 40, fols. 118-119). The Ashokan Reservoir is a natural basin, at an elevation of about 580 feet above sea level and about 180 feet deep in its deepest point (S. R., p. 40). One of the advantages of this site is that its elevation above sea level enables water stored in it to flow down by force of gravity into the high buildings in the City of New York, thereby

saving considerable expense by obviating the necessity of pumping, or in substituting gravity for a pump (S. R., p. 41).

When the work which the City is now performing in the construction of this new water system will have been completed, the supply will be a source of considerable profit to the City (S. R., pages 41-42, fols. 123 *et seq.*).

The water rents which will be paid by the inhabitants of New York City within ten years successively from the time the water begins to run from this reservoir site upon the completion of the system, will be sufficient to pay for the entire system, and thereafter the City will be deriving a net profit of \$10,000,000 per annum (S. R., p. 42). This calculation of \$10,000,000 net profit per annum to the City of New York from the sale of the water which will be impounded in this reservoir site, is based on the sale of this water at \$65 per million gallons (S. R., p. 42, fol. 126).

Water is now selling in the City of New York for \$133 per million gallons (S. R., p. 42, fol. 126).

It follows from the above facts that if the City of New York continues to sell water at the rate of \$133 per million gallons instead of at that rate of \$65 per million gallons, it will make instead of an annual profit of \$10,000,000, an annual net profit of over \$21,000,000.

The reservoir site, together with a thousand foot area which will adjoin the borders of the lake when completed will comprise about 16,000 acres of land.

(B) *The proposed testimony offered and rejected by the State Courts is not speculative.*

The learned and zealous special counsel for the City claimed in the Courts below, that this testimony is in-

competent, because the law will not take cognizance of damages which are unprovable, and that this element of value is unprovable, because it is too speculative.

Their argument on this point is very ingenious and quite novel. On page 20 of their brief in the Appellate Division, they use the following language:

"If any adaptability exists, which is not obvious from an inspection of the land itself, the fact must be established by the testimony of the witnesses, and if the testimony of the witnesses on the subject is so inherently incompetent, that it cannot be received, then for all legal purposes, the fact is, as though it had no existence, and therefore cannot be considered."

Why assume as matter of law, that all testimony on this issue must necessarily be inherently incompetent?

If it be mere guesswork to take into consideration the probable advantages, and commercially profitable uses for this property, in the present, and in the immediate future, for the purpose of determining its present market value, then it is equally mere guesswork to take into consideration, impending changes in the character of city neighborhoods, when residential or business property is purchased by private individuals.

If it be mere speculative, conjectural or guesswork evidence, in valuing property, to ascertain, to what profitable uses, consistent with the present or immediate future wants of the community a piece of property may be advantageously put, then, it must necessarily follow, that for thousands of years, in all civilized lands, under all systems of laws, persons, in their daily transaction have been valuing property on an entirely erroneous and speculative basis; then it must necessarily follow that the United States Supreme Court is

unqualifiedly wrong, when it says in *Boom Co. v. Patterson*, 98 U. S., 403, 408.

"So many and varied are the circumstances to be taken into account, in determining the value of property, condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but as a general rule, we should say, that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the immediate future;"

then it must necessarily follow that Judge Willard Bartlett and Chief Judge Cullen were unqualifiedly wrong, when they said in the *Matter of Gilroy*, 85 Hun, 424, 426,

"The doctrine that the fitness of lands for particular purposes is an element in estimating their market value in condemnation proceedings, is supported by the decision of the Supreme Court of the United States in the case of *Boom Co. v. Patterson*, 98 U. S., 403."

The learned special counsel for the city recognizing that the principle of the *Boom* and *Gilroy* cases directly applies to the case at bar, have not attempted to distinguish them, but they content, to use their own language, quoted from pages 36-37 of their brief before the Appellate Division.

The definition of special adaptability invented by counsel for the City will be referred to in this brief hereafter. We will now continue to confine ourselves to the one claim of the City's counsel under consideration, that this testimony should be excluded because it is mere guesswork.

Such testimony is no more guesswork in this case, than in any other where the special adaptability of property is taken into consideration.

In *Blake v. Griswold*, 103 N. Y., 429, 436, this Court held, that a person experienced in the development of mining property, and in the difficulty and uncertainty of determining its value, is a competent witness, on its value, even though, "such value was speculative, by which he plainly meant, that as mining property, and for mining purposes its value in the result was uncertain."

"But it had a value nevertheless, and beyond that belonging to it as land, and for agricultural purposes, but affected by the uncertainty both as to the quality and extent of the veins."

In the *Amer. & Eng. Encyc. of Law*, 2nd. Ed., Vol. 12, page 484, it is said, citing *Spring Valley Water Works v. Drinkhouse*, 92 Cal., 528

"The president of a water works company was allowed to give an opinion as to the value of certain lands for use as an irrigation reservoir, they being peculiarly fitted therefor."

In *Chandler v. Jamaica Pond Aqueduct*, 125 Mass., 544 Bowditch a landscape gardener, who was unfamiliar with the farm value of the property was asked over an objection: "What the land in question was suitable for in his opinion as a landscape gardener," the Court said at p. 551:

"The testimony of Bowditch tended to show the character of the land and the purposes to which it was adapted, and was competent."

In *Lake Shore and Mich. So. Ry. Co. vs. Chicago and Western Indiana Rd. Co.*, 100 Ill., 21, 33, the Supreme Court of Illinois held, that it was competent to

ask a witness the value of the land for railroad purposes, it being adaptable therefor, and that such evidence must be considered with the other elements which go to make up market value.

In *Read v. Barker*, 30 N. J. L., 378, 32 N. J. Law, 477, a witness was allowed to testify to the value of water power for milling purposes.

In *Lowell v. Middlesex County*, 146 Mass., 403, and *Warren v. Spencer Water Co.*, 143 Mass., 155, witnesses were permitted to testify to the value of water power, for manufacturing purposes, and to the value of the flow of water, for raising cranberries, although in the latter case the witness had never personally experimented with that industry.

If it be speculative to offer evidence, as to the present market value of water supply property, when all of the elements which enter into its value, are capable of almost definite ascertainment, then, how much more speculative must it be, to admit the testimony of witnesses, concerning the value of undeveloped water powers and mining claims! And yet such testimony has been uniformly held to be competent by the Courts of New York and other States.

Every day in the Courts, testimony is allowed on the value of medical, legal and other services, on the value of real and personal property, and on the value of intangible rights. All such testimony is speculative, in the sense, that witnesses cannot determine with any degree of mathematical certainty, the exact value of any of these things; yet their opinions are evidence of the ultimate fact of value.

So in the case at bar, the evidence embraced within claimant's offer to prove before Commission No. 6 was competent evidence on which alone the fact of value, could be based, and for which alone an enhanced

value on account of it being a water supply property, could be determined, and the refusal of the Courts to permit such evidence, was a denial of due process of law and a violation of the United States and State Constitutions.

The most able, experienced and conscientious real estate brokers, dealers and experts frequently honestly differ over the value of suburban and urban real estate, and yet the Courts have never held that to be a reason for excluding testimony of this character. The argument of opposing counsel is founded upon the proposition, as a matter of law, that no witness can be found in the wide world, who is competent to form an opinion of the real market value of this land, taking into consideration, its availability and adaptability for water supply purposes, as well as its other elements of value, and therefore, although it has such an element of value, it is unprovable and for that reason the claimant must submit to the confiscation of his property. The same reason if sound applies to all vacant land.

Every man who deals in land or real estate, is a so-called speculator. He buys with the view of increasing value, and nowhere is this point better demonstrated, than in New York urban and suburban real estate, where values in many cases have increased at a fabulous rate.

The purchase of vacant property is looked upon and spoken of in daily conversations, as a speculation in land; yet it cannot be seriously contended, in case the City of New York desired to condemn some vacant lots, that witnesses were not competent to testify to their value, because their testimony would be speculative.

The availability and adaptability of this property, as part of a reservoir site, are not and cannot be denied,

and whether this enhances or decreases the value of this property, is a proper subject of testimony which may not be denied the owner unless his constitutional rights are to be denied him to his serious loss, disadvantage and great hardship.

Natural reservoir sites, which can be used profitably and commercially, are very few and far between not only in the State of New York, but throughout the Union. These sites should be likened to, and are far superior to undeveloped coal, oil or mineral lands. The aqueduct is as necessary to convey the water, as the railroad to haul the coal, oil or minerals. Dykes and dams are as necessary to impound the water, as are smelters, furnaces and refineries to commercialize the product of coal or oil.

To say that the expense necessary to put these undeveloped properties into commission, prohibits the owner from obtaining any intrinsic value over and above farm value, because he is unfortunate enough to have his land condemned, is grossly unjust. The advantage, must be noted, is all in favor of the reservoir. This element of value should be shown. The supply of coal, oil or mineral is more or less speculative and the mine continually depreciates in value, as the product thereof is taken out; while on the other hand this supply of pure and wholesome water, is, not only, never failing and a known quantity, non-speculative, and a means of profit to the community or owner who puts his property to its best use, but the demand for water and reservoir sites is steadily and continually increasing, and none will gainsay, that water is as much a necessity of life, as coal or oil.

Opposing counsel contended in the Courts below, that this class of testimony is incompetent, because this element of value cannot be determined in advance

but can only be determined after the City improves and uses the land for water supply purposes. Then only it is claimed can it be determined with certainty, from the enormous income of the works, what part of the income is properly attributable to this land; and as the City may never complete the works, or may improperly manage them, this element of value depends upon too many contingencies and for that reason is incompetent.

This entire argument, it must be noted, assumes that the claimant is seeking to measure the value of his land by the profits, which the City will derive from its use. Nothing, however, is farther from his intention or the truth. Yet on every occasion, such a contention is purposely thrust into his mouth by opposing counsel, and the learned Appellate Division assumes that to be the claimant's position.

While under all the authorities, profits derivable from the use of land are not competent evidence of its market value, because they depend upon the personal management and particular business of those using the land, it has been uniformly recognized, and is well established, that the *savings* accruing to the condemning party by taking the particular land in question in preference to other land of a similar character, which saving would accrue to any person using the land for the same purposes, must be taken into consideration, as competent evidence of the market value of the property.

On this point the United States Supreme Court in two well decided cases, *Boom Co. v. Patterson*, 98 U. S., 403 and *Great Falls Manufacturing Co. v. United States*, 16 U. S. Ct. of Cl., 160, affirmed, 112 U. S., 645, held, as it says in *Boom* case at p. 408, that

"The Boom Co. would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river, as by utilizing them, in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptation for boom purposes was a circumstance, therefore, which the owner had a right to insist upon, as an element, in estimating the value of this land."

In Great Britain the decisions are uniform in reservoir site cases, that availability and adaptability must be taken into consideration.

In *Manchester v. Countess Ossilinski* (unreported, filed on the brief of James Dunne in the Matter of Brookfield, 176 N. Y., 138 Vol. 2043, N. Y. Law Institute Library), the court said, in answer to the contention that the availability and adaptability of the property being condemned for reservoir or water supply purposes, was speculative, fanciful and visionary, because it had never before been used for such purposes.

"You must not look at the particular purpose which the defendants before the arbitrators are going to put the land to, when they take it under Parliamentary powers, or undertakings for any special purpose, but you may possibly use it, as an illustration to anticipate or answer an argument, that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them, and I do not see any objection to that being used as an argument. This is a matter of fact."

In the same case, Stephen, J., said:

"As to this particular piece of land, I will not say it is unique, but it is very nearly unique.

It is one of the small number of places which is capable of being made into a reservoir which would supply any towns with which they might be connected. We all know that Thirlmere lies very high, perhaps I have a right to impart my own knowledge of the country into it, but I think it would not be very much less than 800 or 900 feet above the sea level—the top of the water—and with a large quantity of water at that level you might carry it very nearly to any large town in England, that, being so it seems to me quite absurd to say there is not a special value attaching to that particular matter, or to say that the Countess who owns a part of it should not be compensated on that footing. No doubt, it has been pointed out very fully by the Attorney-General and by Mr. Horace Davey that her land alone might not be or probably would not make a reservoir, because it does not go all around the lake, and because parts of the land are scattered about. No doubt, that is perfectly true; but then at the same time it contributes to it. It is absolutely essential to a reservoir, and no reservoir could be made in those parts without taking her land any more than a reservoir could be made on her land without taking the land of other persons in the neighborhood.”

In *Currie v. Waverly, &c. Railway Co.*, 52 N. J. L., 381, 394, the Court, after reviewing many of the well decided authorities in this country says:

“Under the law, as thus expounded, the landowner in the present case should have been permitted to produce evidence, as to the situation and surroundings of his land, as they existed at the time of the location of the company's route for the purpose of demonstrating, if he was able, that there resulted to his land from these circumstances, a special value, growing naturally out of the best uses to which, from

its situation it was presently adapted. Guarded by the exclusion of speculative opinions upon the one hand, and of the individual advantage to the condemning agent upon the other, such a course will best secure to the owner of the land taken, that compensation for their general value which is guaranteed by the constitution wherever private property is taken for public use."

Lord Alverstone expressed the same opinion *in re* Gough, Law Reports, 1 Kings Bench, 417 (1904), saying:

"Naturally the peculiar adaptability of the land for a reservoir should be taken into consideration in fixing the compensation to be awarded."

A careful examination of all the cases on this subject, throughout this country, Great Britain and the continental countries of Europe, will show that such is the uniform law.

As a matter of practical application, this law is recognized and applied by the executive departments of governments. The United States Government in the purchase of lands on the Isthmus of Panama applied this principle in actual practice.

The United States paid ten million dollars cash, for a narrow strip of land, 5 miles wide, on each side of the canal, in addition to a rental of \$250,000 in perpetuity. This price was paid without any regard to the forty million dollars paid for the canal strip and the unfinished work undertaken by the French. Thus, it will be seen, that considerably less than 330,000 acres of land were purchased for ten million dollars, in addition to \$250,000 rental or the equivalent between \$50 and \$55 per acre, for wild, unimproved, vacant land in a barren country, without population,

never cultivated by man, for practically valueless land in the tropics, which it must be conceded by all would not bring 50¢ to \$1.00 gold per acre, in the open market. In fact, this land had no selling value whatever, nor had the inhabitants who owned it the necessary funds for embarking on a mammoth undertaking like the Panama Canal. Yet, this government did not take these lands away from these people without just compensation, but evidently wanted to treat fairly with these poor, defenseless people, in taking their lands; and recognizing and applying the principle of special adaptability, allowed them from 50 to 100 times its marketless agricultural value, as the government fully recognized the strategic location of this strip of land and its availability and adaptability for special usage, and was willing to pay on that footing. The final price paid by the United States Government for some of these lands was as high as from \$150 to \$250 per acre.

The United States Government unquestionably was advised in this matter by its Attorney-General and the whole staff of his legal department and by the Secretary of State and other members of the President's cabinet, composing together some of the best and ablest brains and experience of the world and this is a practical application of the principle of special adaptability.

The executive department of this State has always taken adaptability of property into consideration in making purchases, as may be seen in the acquisition of the forest preserves.

The records show that the State of New York is continually acquiring more and more forest preserves, and, with every purchase, it takes so much more land out of private ownership, with its consequent rise in

value. The records further show, that for Catskill and Adirondack, wild, inaccessible mountain lands, the State has paid in advance of 400 to 500%—\$6 to \$7.50 per acre, for lands that they only paid \$1.50 per acre for five or six years ago. The records further show, and can be proved by the City's own witnesses, that the value of land in the Ashokan section, as testified to, are entirely too low, and the fact must be recognized, that prices have increased 25% and upward, as far as 20 miles west in the Big Indian section, practically well removed from all city influences. such has been the effect of publicity and agitation.

A practical application of the principle of special adaptability has been made by the Courts of New York State in the cases of the Croton River Reservoir, Cornell dam and Catskill Aqueduct, and the Courts of many western states and territories.

Thus, in *Seattle & Montana Rd. Co. v. Murphine*, 4 Wash., 448, wild mountain land, of a nominal value, was valued in condemnation at \$574 per acre, on account of its special adaptability for railroad purposes, and that award was confirmed by the Court.

Counsel for the City further contend that the offers to prove lacked one essential element. They claim, quoting from their brief before the Appellate Division (p. 26):

"A fair test of admissible expert testimony as to value distinguishing it from pure speculation, is found in the answer to the inquiry. Has the element about which inquiry is made affected the public mind to the extent that it would naturally be considered by an intending purchaser?"

Their argument is that if the public mind had become affected or made aware of the value of this prop-

erty that would necessarily have affected its market value, but so long as the property itself is inherently valuable, and the public mind has not become inflamed or affected on the subject, its market value is not affected. If this be a sound argument, then any owner who is shrewd enough to inflame the public mind or to advertise the value extensively may reap the full benefit of the value of his property, while the modest and respectable owner who would shrink from such a course, would lose this inherent element value in the property. Such a contention on its face would appear to be erroneous, and would not even be referred to were it not that it was one of the grounds upon which the learned Appellate Division based its opinion.

On this point, it states :

"It was for the commissioners to determine whether the land was really saleable and marketable as a part of a reservoir site, and if they so found, the real price or sum that could be obtained for it. The appellant did not prove or attempt to prove that the value of the property in question or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes before the commencement of this proceeding. There is no shadow of evidence of any prior demand as a reservoir site, or of any customer who would give more for it for that purpose, or of any circumstance by which the value of the parcel in question as a part of a natural reservoir site could be estimated or determined. In the absence of such evidence, it is plain that the appellant has received the benefit of everything which has enhanced the value of his property, except the increase caused by the taking of it by the City."

The simple reason why no evidence was introduced to prove a prior demand and to prove all the other

circumstances referred to by the learned Court in its opinion, is, that the commission stated in advance their ruling not to receive such evidence if offered. In other words, the opinion of the Appellate Division is an argument in a circle and begs the question. It holds, that if the evidence were allowed to show intrinsic value of the property, Commissioners of Appraisal would err if they did not take it into consideration, but since they ruled out all evidence on the point, they acted perfectly properly in not taking it into consideration.

It is deemed advisable to say a few words here on the question of prior demand. Demand, as used by the Appellate Division in this connection, means the personal solicitation or offer to buy, from a customer, and is a species of evidence, held by the Courts to be incompetent. *Heller v. Paine*, 34 Hun, 177. That such a demand is not essential to prove the market value of property, adaptable and available for a particular use, may be seen by a simple illustration, taken from the ordinary case of suburban property in Long Island.

The rapid, steady growth of a great city towards the outlying, contiguous country districts, leads reasonably prudent persons, familiar with real estate conditions and values, to believe, that the purchase of country lands, well and properly located, have a great future for suburban, residential or trade purposes. Wise investors purchase Long Island farms, by the acre, anticipating that in the course of several years, the acreage will be ripe for development and division into lots, and for sale in lots to city residents.

As the growth of the city approaches the property, the latter daily appreciates in value, even though there may be no demand for it for suburban residential

purposes. There must come a time when there is the first demand. Can it be pretended that prior to the first demand, the property has not increased in value? If it were condemned by the public authorities, the day before the first demand occurred, could they deprive the owner of this element of value, and use the machinery of the law to assess the property at ordinary farm value? The learned Corporation Counsel solemnly assert they could, and abhor any other law, as allowing speculative values. This simple illustration demonstrates the error of the Appellate Division.

As it is in the case of the property just referred to, so is it in this case. As long as the City could utilize the various lakes, ponds and other streams comparatively near it, the value of the Ashokan Reservoir site was not so apparent. But after all other available sources of supply had been exhausted, in the Counties of Westchester and Putnam, which is the case here, it became necessary for the City to seek the next, nearest and cheapest source of supply which would be adequate to meet the growing demands of its increasing population. This reservoir site meets all of the requirements, and for that reason is intrinsically valuable. If the evidence on this point were introduced, it would be clear to everyone that such is the case.

The law of supply and demand applies here, as elsewhere. In this case, the Courts below have nullified that law.

A prior demand for this particular property is entirely immaterial.

(C) *As a matter of fact, however, there were a number of prior demands for this particular property for this very purpose, and offers were made to prove this (fols. 82-83, 84-85).*

These offers were :

"I also offer to prove that there has been a demand both on the part of the City of New York and other cities for an additional supply, and also a demand for reservoir site property.

* * * * *

"I also offer to prove the fair and reasonable market value of this particular piece of property, known as parcel No. 246, taking into consideration the most advantageous use to which it may be put.

"I also offer to prove that the most advantageous use to which this particular parcel of property may be put is to use it as part of a reservoir for the storage of pure and wholesome drinking water.

* * * * *

"I also offer to prove that a demand exists on the part of the inhabitants of the City of Kingston for an additional supply of pure and wholesome water.

* * * * *

"Lastly, I offer to prove the fair and reasonable market value of this particular parcel of land, taking into consideration all of the elements of value comprised in it, including that element of value on account of its natural location and conformation as part and parcel of a natural reservoir site of enormous value.

* * * * *

"Mr. Alexander: I offer to prove the fair and reasonable market value of this piece of property, taking into consideration that element of value which gives it an enhanced value because it is part of a natural reservoir site.

"The Chairman: That we exclude.

"Mr. Alexander: I except. I offer to prove the fair and reasonable market value of the Ashokan reservoir site which the City of New York is now condemning."

The uncontradicted testimony in the Sage case conclusively proves the existence of these prior demands.

The Ramapo Water Co. had endeavored to acquire this very reservoir site. Mr. J. Waldo Smith, chief engineer of the Board of Water Supply, testified that the Ramapo Co. was organized on the hope of being able to sell water to the City of New York.

Mr. Nostrand, who was an engineer for the Ramapo Co., testified in the Sage case that he first began his connection with water supply in 1886. He was the engineer for the Ramapo Water Co. (S. R., pages 82-83). The Ramapo Company was organized in 1898 or 1899. The engineers of this company did considerable work in making calculations and estimates of cost for water supply and construction of reservoirs, in preparing maps, plans and surveys, and in doing other work. These maps were filed in the offices of the County Clerks of Orange and Rockland Counties. The Ramapo Company was formed to supply water to municipalities, and for other purposes, and for water power purposes (S. R., p. 84, fol. 250). This company had made formal applications to supply water to Brooklyn and had informally applied to supply water to New York City (S. R., p. 84, fol. 251). This company contemplated acquiring the Ashokan reservoir site, and with that end in view, had filed maps, made surveys with portions of that site covering a part of it, and eventually would have filed maps covering every portion of the site (S. R., p. 84, fols. 251-252). They contemplated acquiring the site (S. R., p. 84, fols. 251-252).

In the course of acquiring the land which composes the Ashokan reservoir site, the witness acted as the agent of the Ramapo Company, and in the line of his

duty as such, went to Ulster County to personally buy the lands which form part of this site, at as cheap a price as he could obtain for them (S. R., p. 85, fol. 253). Covering a number of years extending from 1895 to about 1900, the witness made contracts with certain parties upon the site of this reservoir, at controlling points, for the purchase of land, and paid down on these contracts the first payment (S. R., p. 85). The owners of these lands knew that they were being purchased for reservoir purposes (S. R., p. 85). This knowledge had an effect on the price of the land (S. R., p. 85). When the witness first started to buy, he tried to get the lands as cheaply as he could. When it became known throughout the section, the price went up to some extent, but he made his contracts mostly within a few days, so as to prevent the rise in value (S. R., p. 85). This was during the years 1898 or 1899.

It was well known throughout that section of Ulster County at that time that there was a demand for this land for reservoir purposes (S. R., p. 86, fols. 256-257).

The Ramapo Company contemplated constructing a reservoir upon the Ashokan reservoir site, and impounding the waters there, constructing an aqueduct to run from this reservoir to the city line, and making a contract with the City of New York to sell this water to it at \$70 per hundred million gallons (S. R., p. 87, fols. 260-262). The Corporation Counsel of the city had drawn up a contract for the purpose of signature (S. R., p. 87). This contract provided for the sale of 200,000,000 gallons per day from the Ramapo Co. to the city at a net profit of 20% on the selling price, and \$70 per 1,000,000 gallons, after allowing for the payment of interest on bonds (S. R., p. 88). This project, if carried out, would have amounted to a

net profit, over and above all interest charges, to the Ramapo Company of over five million dollars per year.

This witness made a comparison from official records, showing the price paid by consumers to New York City for water during the year 1900; also who furnished the water. The price paid ranged from \$100 per million gallons up to \$500 per million gallons. The correctness of these records is beyond dispute, and was not questioned (S. R., p. 88a, Exhibit G).

The Ramapo Company contemplated getting this 200,000,000 gallons of water per day, from the development of the Esopus watershed alone (S. R., p. 89, fol. 267). The estimated cost of construction made by the Ramapo Company for this development was less than \$50,000,000 (S. R., p. 89, fol. 267).

There was spread upon the record a list of the various properties which this witness, while in the employ of the Ramapo Company, had obtained options on (S. R., p. 92), showing the names of the sellers, the kind of property, and the purchase prices. In some instances, when a renewal of these contracts was requested, the owners demanded a higher price, and the contracts were renewed at an increased price.

Joseph S. Hill, of Olive, whom it will be conceded has been a perpetual witness for the City of New York, testified in the city's favor against a large number of claimants, and testifying to very low valuations on other property, had a piece of property of 30 acres which he offered to sell to the witness for \$2500 (S. R., p. 92, fols. 275-277).

The Ramapo Company contemplated furnishing water to other communities besides New York City. Included in these other communities were Albany,

Newburgh, Kingston, Poughkeepsie, and a number of small places between New York and Albany. During 1899 and 1900, and from then on, there was a growing demand for water from these various cities (S. R., p. 93). The population of these cities through the Hudson Valley was increasing from time to time as shown in the census reports (S. R., p. 93). The City of New York utilized the maps and surveys that were made by the Ramapo Company, and took up the same locations (S. R., p. 93).

The City of Kingston had, as early as 1893, sought the Ashokan reservoir site as a source of its own water supply, and from then on until 1897, this matter was very seriously considered by the City of Kingston, and a copy of all of the proceedings of the Common Council of that city and of its committee relative to obtaining a source of water supply from this site, was offered in evidence and forms a part of this record (S. R., pages 419-470). An inspection of this testimony will show this Court how great a demand there was for this site, and how profitable this property is.

Mr. Nostrand further testified that land which forms part of the reservoir site is of greater value than similar agricultural land, which is not a part of a reservoir site.

Cornelius C. Vermeule, one of the ablest and most experienced water supply engineers in the country, testified that the demand for water within 100 miles of the Ashokan Reservoir site amounted to about 738,000,000 gallons per day in 1907, and is increasing at the rate of about 50% each ten years, which will call for 1,107,000,000 gallons a day by 1917, and 1,660,000,000 gallons a day by 1927 (S. R., p. 187, fol. 560). This demand for water on the part of various communities within 100 miles

from this site has been very great for ten years prior to 1907 (S. R., p. 187).

This demand will absorb all the good available reservoir sites near New York City within the next twenty years (S. R., p. 187, fols. 560-561).

The demand for water comes from New York City, all of the cities up the Hudson as far as Cohoes and Schenectady, and from New Jersey within twenty miles from New York City (S. R., pages 187-188). Some of the cities in New Jersey which demand water are Jersey City, Newark, Paterson, the Oranges, Passaic, Elizabeth and other cities having an aggregate population of about 1,500,000 (S. R., pages 187-188). These cities are continually growing in population (S. R., pages 187-188).

All of the public records on file, the public press, including all of the large newspapers of the City of New York, and many of the most important magazines throughout the country show that the public mind was inflamed on this subject, long before the City of New York commenced this proceeding, and that prior demands actually existed for this land for water supply purposes. The evidence will show that prior demands, and, in many cases, urgent ones existed on the part of many cities, towns, villages, communities and localities, for potable water for water power, and for this very water, and that this site was the most available source from which such demands could be supplied.

That there were previous demands by private capitalists, as well as by municipalities, for this very site, and for this very purpose, cannot be disputed. A reference to the Parrot plan, 1886, Ramapo, 1887 and Kingston, 1893, proves this. (See Burr-Herring Freeman Report.) Peekskill, Newburg, Poughkeepsie, Yonkers, Brooklyn, Schenectady, Cornwall, Mid-

dletown, New Paltz, Highland Falls and other localities demanded this water, long before the statute under which New York City is now condemning this site was passed.

There had been from 1886 until 1900, agitation by the public press and magazines on this very subject over this very site. (See Freeman Report, 1886; Report to the Hon. Bird S. Coler, 1900, and the Merchants' Association Report, 1900.) In addition to these three reports, there have been many others since that time, and a great advance in the market values in the properties in the Ashokan Reservoir section had taken place, long before the first set of Commissioners of Appraisal were appointed and had qualified to condemn the land (February 3rd, 1907).

The Metropolitan and local press had many leading articles, double and single page illustrations, drawing attention to these lands and their increase in value long before the appointment of even the first Commission. Among other papers are the New York Herald, Sun, World, Journal and Kingston Freeman.

(D) The reasoning by which the Appellate Division of the Supreme Court of New York State reached its conclusion, which was affirmed without opinion by the State Court of Appeals, so far as it is clear and to be understood, is unsound in principle and necessarily leads to a false result and to the confiscation of the property of plaintiff in error.

The Court says that the duty of the commission "is to award compensation for the taking of the land and not for the use to which it will be applied when taken."

If by this somewhat confused statement it is meant that they were not to award as compensation to the

owner what it is worth to the party taking the property, it is undoubtedly correct. If, however, what is meant by it is that they were to exclude the value of the use to which the property is to be applied after it has been taken as an element of value in determining the just compensation to be given to the owner, then it is wrong.

While commissioners are not to award as compensation to the owner what the property is worth to the condemning party, yet that does not exclude from their consideration the value of that use of which the property is susceptible, simply because the party condemning it is going to put it to that use.

The fact that additional value is given to the property because it is available as a site, and the only available site, for a reservoir to supply the City of New York with water, and that New York needs an additional supply of water, is something that should be taken into consideration, notwithstanding it is the City of New York that is taking the property. That is a separate and distinct thing from evidence of what it is worth to the City of New York.

In cases of *Boom Company vs. Patterson*, *Matter of Gilroy*, *Trustees of College Point vs. Dennett*, *Matter of Daly*, and in a number of other cases, hereinafter referred to, the use which was held to enhance the value of the property, was the very use which the condemning party proposed to make of such property, and in most cases, notably in the *Boom Company* case, and in the *Gilroy* case, they were the only parties that could make such use of the property.

Indeed that is the case in almost all proceedings for the condemnation of property. It is condemned because it is peculiarly available and adaptable to the use which the condemning party proposes making of it,

and to exclude that use as an element of value would, in most instances, exclude the chief element of value in the property condemned.

Assuming that the Ramapo Water Company was seeking to condemn this same site, would not evidence that the City of New York needed an additional supply of water and that this particular site was the only available one from which to secure such additional supply, and that thereby the value of the property was enhanced, be admissible evidence in such a proceeding. Does it make any difference in the rule that instead of the Ramapo Water Company being the condemning party it is the City of New York?

The question is, does the City of New York need more water? Is this site an available one for that purpose? Does that necessity and availability give to this land any additional value? If so, the claimants are entitled to give evidence of it, and are entitled to receive some compensation for that additional value to their lands, no matter by whom it is taken.

When it is said that the value of the use to the condemning party of the property taken, or the value of the special use to him for which such property is available and to which he proposes to apply it, is not the measure of just compensation, but that such measure is the market value of the property, it does not necessarily mean that such value, or the value of such use to the condemning party, is not to be taken into consideration.

The market value of property, available and adapted to a special use, means the market value of that property, taking into consideration its availability for the special use to which it is adapted and to which it is to be applied by the party purchasing it.

Market value does not necessarily mean the full or actual intrinsic value. In ordinary business transac-

tions the purchaser does not pay the full, actual or intrinsic value of the property purchased by him. If he did, there would be no profit in it to him; and it is upon the same principle that in determining what is just compensation for property taken, the party for whose benefit it is being taken is not compelled to pay the full, intrinsic value of such property. If so, it would be compelling him to pay more than in an ordinary business transaction, a willing purchaser from a willing seller would have to pay.

Ordinarily market value contemplates a willing seller and a willing purchaser; neither the seller realizing, nor the purchaser paying, the full, intrinsic value of the property; the margin between such value and the amount for which it is sold being divided between the seller and the purchaser as a profit made by each upon the transaction.

Of course, there are many cases where the purchaser, for one reason or another, is willing to pay the full, and even more than the full, intrinsic value of the property purchased by him. But they are exceptional cases; we are speaking of the ordinary business transactions, between willing sellers and purchasers, who are buying and selling for their mutual benefit. The one buys and the other sells to make a profit upon the transaction; neither one can obtain the full profit, it must be divided, otherwise there is no mutual benefit.

And an award which does not take into consideration the value of the special use to which such property is adapted, and to which it is to be applied by the party for whose benefit it is being condemned, deprives the owner of that share of the value of such use which he would realize if he were a willing seller to a willing purchaser proposing to avail himself of

the special use which gives it additional value; and gives the entire value of such special use to the party for whose benefit and use it is condemned, without his paying any portion of the value of such use.

Again the Court says (*Matter of Simmons*, 130 App. Div., 350, 352, 353):

"It is only when it is shown that it has a market value for some particular use that the availability and adaptability of the property to the use, can be taken into account by the commissioners in determining its fair market value.

"The owner is not entitled to swell these damages beyond the fair market value of the lands at the time it is taken, by any consideration of the chances or probabilities that some time in the future it may be used for some purpose to which it is adapted, unless it appears that the market value of the property is enhanced by the chances or probability."

This statement assumes, that if it had been shown that the property had a market value for some particular use, that, then, the availability and adaptability of the property to that use could have been taken into account by the commissioners in determining its fair market value, and, also, if it had appeared that the market value of the property had been enhanced by the chance or probability that some time in the future it might be used for some purpose to which it is adapted, the commissioners might have taken that into consideration in determining its fair market value.

If so, then the claimant had a right to give evidence of its market value for some particular use, and had a right to give evidence that the market value of the property had been advanced by the chance or probability that it might be used for some particular purpose to which it is adapted.

The claimants offered evidence of all these things, which evidence was excluded, and under the foregoing assumptions appearing in the opinion in the Courts below, the award should be set aside, because the claimant was not permitted to show that which the State Courts say that the commissioners should have taken into account if there had been any evidence thereof.

Again the opinion proceeds, page 354 (Matter of Simmons, *supra*):

"The proceeding was based upon a demand for the property on the part of the City of New York and its adaptability and availability in conjunction with other parcels for a reservoir site. The record shows that the commissioners understood that these facts were established, and that they went no further than to hold that the facts could not be considered in forming an opinion of the market value of the property, in the absence of any evidence showing that they had enhanced or affected its value, before it was appropriated by the City."

And the opinion approves of that holding of the Commissioners.

This is in direct conflict with the ruling in the Boom Co. and Gilroy cases. In the latter case the Commissioners "practically held that the availability of the property for use in connection with the water supply of New York City could not be taken into account by them in determining what was the fair market value of the premises." And the Court in setting aside their award, said:

"To ignore its adaptability to furnish water to the City of New York is to leave out of consideration the most important element which gives it any value in the market."

So, here the Commissioners, with the approval of the courts below, have left out of consideration the most important element which gives this property value.

In effect, the rulings of the Commission, and of the courts below, confine the estimate of value of the property to its value for purely agricultural purposes, and no other; exclude its value for any other or future use whatever, no matter by whom taken.

Land frequently has a potential value for certain purposes for which it is not being used; for purposes, sometimes, of which no one has theretofore dreamed, and for which no demand has as yet been made. Yet the instant this value is discovered and published by anyone, it is appreciated by many others, and at once constitutes a part of the market value, or if not of its market value, then of its actual or intrinsic value.

The fact that no one up to that time had made a bid for the property for such purpose or that no one in the vicinity in considering the salability of the land in comparison with other tracts has taken into consideration its peculiar adaptability and consequent value for such purpose is immaterial. Where the public proceeds to take property under eminent domain for the purpose of devoting it to a peculiar use the property is of special value, not only to the public which is about to take it, but to all other persons or corporations engaged in the same or similar enterprises which could use such land in furtherance of their business. It cannot be possible that the mere fact that one public corporation has pointed out the peculiar adaptability of a certain tract of land for its own business would deprive the owner thereof from obtaining through condemnation proceedings the value of the land which he might well obtain if the property were offered to

any other similar corporation. Nor can a public corporation estop the owner from claiming such value on the ground that no other bid has been made for the property for such purpose, because the condemning corporation is the first in the field and by its operations it has prevented the owner from offering the property to others, and these others from making a bid for the property. It would seem to follow, therefore, that if the owner can prove the adaptability of his property for special purposes which are not limited solely to the condemning corporation, and also the fair value of his property for these special purposes, such value must be considered and allowed by the Commissioners, and if they fail to do so their award must be set aside, on the ground that they are depriving the owner of his property without just compensation, and therefore without due process of law.

The statement in the opinion that the Commissioners considered as proved that the site was peculiarly adapted for the purpose of a reservoir and absolutely required by the City of New York for that purpose, but that they would not take that into account in estimating the fair market value of the property, shows that the Court believed that the offer of the claimant did not include evidence of the availability of this property for the purpose of a reservoir to supply other localities than the City of New York and of its value for this special purpose. While the Commission conceded its adaptability for the necessities of New York City it rejected evidence that it was equally adaptable for the uses of other localities and it rejected the further evidence that it had any special value because of this wider adaptability.

(Note.—In this connection the attention of the Court is called to the fact that by Section 40 of the

Act under which this proceeding is taken, Chapter 724, Laws of 1905, it is made lawful for any of the municipal corporations in the County of Westchester, to take and receive from any of the reservoirs, aqueducts, etc., of the City of New York, a supply of water for the use of such municipal corporations, upon the paying to the City of New York water rents or charges in the same amounts as are charged by the City of New York to persons using water in that city; evidently contemplating that the additional supply of water to be secured under the provisions of said Act was to furnish the cities and villages of Westchester with water, as well as the City of New York.)

If the principle enunciated by the Court is correct, it follows necessarily that a public corporation which is the first to discover the special advantages which a property has, and for which after discovery there would be many demands, could obtain that property through condemnation proceedings without paying anything for the special value which the property possesses. In other words, the discoverer and not the owner of the property would receive all the advantages of that special value. It would follow from the further application of this principle, that a public corporation which discovered that land, which had been used solely for farming purposes, contained rich mineral deposits, could obtain possession of the property without paying anything except the value of the land merely for agricultural purposes. Or if a corporation discovered that certain trees, which up to that time had been regarded as weeds, could be used for a special purpose which would render them of great value, it might obtain possession of a great forest tract which up to that time had been regarded as comparatively worthless by paying merely a nominal price.

While it is true that under condemnation proceedings the necessities of the purchaser cannot be considered so as to swell the damages sustained by the owner of property, yet if this necessity consists merely of the desire to use the property as most available for special purposes, which would appeal with equal strength to others besides itself, such availability for that special purpose gives the property an extra value which ought to be considered and allowed to the owner. The mere fact that it has never been considered up to the time of the condemnation proceedings, and consequently has not affected the market price of the property up to that time, is immaterial if it would make the property sell for a higher price to people who could use it for that special purpose. The rule in such cases must be, not that it has swelled the market price, but that it would at the time of the award increase the selling price of the property among other people if they had an opportunity to bid for it. If the owner is prevented by the Commission from producing evidence of this increase in the selling value of his property he is deprived of it without being awarded just compensation.

The market price considered by the Commissioners apparently was the value of the property in the local market. There, of course, the sole consideration would be the adaptability of the property to farm purposes. The small dealers in the vicinity naturally would not speculate upon the value of the property which would attach to it for reservoir purposes, after some corporation possessing millions of dollars should endeavor to obtain the most available site for the purpose of supplying the numerous cities of the State of New York with pure water. The value of the property for that purpose would be considered only by

some promoter who would endeavor to dispose of all the property needed for a reservoir to some corporation; or by some public corporation which had been commissioned to supply some great municipality with drinking water. In order to obtain compensation for the value of the property for this latter purpose a much wider market would have to be sought and found than the smaller market which alone was considered by the Court. Yet it is conceivable that such a market might exist; that some promoter might have had this very locality in consideration and that a number of municipalities had been searching for the best locality to establish a reservoir for the storage of drinking water, and in that event there would have been a market other than that considered by the Commission in which this property might have brought the additional price sought for this special purpose. Yet, the Court rejected all evidence which might have established this wider market, and this additional value, and the claimant was deprived of the opportunity of proving this additional market value of his property. A parallel case might have been found years ago in the oil fields of Pennsylvania. There, farm lands were in a day enhanced in value by millions of dollars. There, property which might have brought but a nominal sum if the sale had been restricted to a local market, and to local considerations, realized enormous sums when thrown open to the markets and to the consideration of the world. So in this case, the local market, and the necessities of the rural community, should not govern the value of this property, if it can be shown that it has a special value for millions of citizens in New York, and for hundreds of thousands of people in other municipalities. The claimant offered to prove that it is available for this special purpose and that it

has an enormous value in such broader market, but he has been deprived of all opportunity to produce evidence upon these two points.

"The evidence on the part of the defendants was mainly confined to the amount of wharfage actually collected for the use of plaintiff's property at and immediately preceding the time of its appropriation by the defendants, and the estimate of witnesses of the annual income to be derived from it, and it was this testimony which was adopted and followed by the referee in arriving at his conclusions upon the subject of value. The application of this rule limited the consideration of the question to the actual present productiveness of the property, which might be dependent upon a variety of causes, not affecting its intrinsic value, and which did not therefore, afford a safe or reliable criterion of its worth to the owner. If the sovereign power, in the exercise of the right of eminent domain, could take the property of the citizen at a valuation based upon the net income realized from it, it is feared that a very large part of the farm property of the State could be acquired by it at a purely nominal consideration. *But it is the potentialities of a given piece of property, both developed and undeveloped, which constitute its chief element of value.*"

Langdon vs. Mayor, 133 N. Y., 628-30.

The Boom Co. vs. Patterson, 98 U. S., 403, and Matter of Gilroy, 85 Hun, 424, are controlling authorities. Opposing counsel claim, they are bad law. The Appellate Division relied upon some cases which it supposed overruled these authorities and misapplied the well settled and sound principles of law contained therein.

The Appellate Division relied upon Albany Northern R. R. Co., 16 Barb., 68; Matter of Daly, 72 App.

Div., 394; Matter of East River Gas Co., 119 App. Div., 350; Moulton v. Newburyport Water Co., 137 Mass., 163; Matter of New York L. & W. R. R. Co. v. Arnot, 27 Hun, 151; Matter of Daly v. Smith, 18 App. Div., 197; Matter of City of New York, 118 App. Div., 272; and Village of St. Johnsville v. Smith, 184 N. Y., 34.

In the Matter of Daly, 72 App. Div., 394, the Matter of Gilroy, 85 Hun, 424, is cited and approved. All that Matter of Daly, *supra*, holds is that the value of the property should not be measured by its value to the condemning party, and in that case, the court expressly says:

"It was proper to consider, as an element in the market value of the property to be taken, the existence of a demand for such property on the part of the city; this does not authorize an inquiry, as to what that particular property was worth to the city."

In Matter of Daly, evidence was received and an award made on the value of the property *to the City*.

The Matter of East River Gas Company, 119 App. Div., 350, also recognizes the doctrine of the Gilroy case, and the Appellate Division, First Department, p. 353, says:

"In arriving at any estimate of the value to the owner, the Commissioners were also required to take into account, the availability and adaptability in the hand of such owners of the property taken for particular uses and purposes."

Moulton v. Newburyport Water Co., 137 Mass., 163, referred to and quoted with approval by the Supreme Court of Massachusetts, in one of its later decisions, Sergeant v. Town of Merrimac, *supra*, is a dis-

tinct authority for the same proposition as that laid down in the Boom and Gilroy cases.

In the Matter of Daly v. Smith, 18 App. Div., 197, an owner believing his property was to be taken, mapped it out into building lots, although there was not the remotest expectation, that his property was available and adaptable, at that time, or would be in the immediate future for such purposes. In that case, Judge Cullen very properly held such was an improper element of damages because the property had no intrinsic value for such purposes, and was not available and adaptable at the time.

The claimant's property in that case, was far removed from all building sections. The Commissioners allowed \$750 per acre for 12 1-3 acres and \$1500 per acre for another 12 1-2 acres, and the records shows, that he bought this farm land, within three years of the taking, at only \$150 per acre. In the case at bar, an entirely different question is presented, and one which is not disputed. The availability and adaptability for water supply purposes are admitted, and the Courts below have excluded all evidence, on this point, and notwithstanding the availability and adaptability of the property and its enormous "intrinsic value," the owner through some erroneous method of reasoning is allowed \$55 per acre. The award here is shocking to the sense of justice, and is made even without due regard to its farming value.

In the case of Daly v. Smith, the Commissioners received all evidence on the availability and adaptability of the property for building lot purposes, and held the same not to be available and adaptable for such purposes, and to have no intrinsic value for such purposes.

This is a case where an actual demand exists for this property for water supply purposes, and it is con-

ceded to be available and adaptable for such purposes. That the owners of this property have not as the Appellate Division says "mere hopes that the property may at some future time, be required for a reservoir or for a storage basin for supplying the City of New York and other cities with water" is shown by the City condemning this particular property, for such purposes by the well known fact that this property was the most available and adaptable which has been a matter of common knowledge for the last twenty or thirty years, *i. e.* from 1886 at least.

The Ramapo Co. had options on this property (which are now on file in the office of the County Clerk of Ulster County) long prior to the City of New York ever taking any action in this matter. It was the plan of the Ramapo Co. to utilize this storage basin as its reservoir and to make a contract with the City of New York to sell the water to the City at \$70 per one million gallons. All these facts are a matter of public record. They have been iterated and reiterated by the municipal authorities from time to time, and the public officials who held office, made great political capital out of their having frustrated the plans of the Ramapo Co. The claimant was denied his constitutional right to prove these facts or any of them.

The United States Supreme Court might just as well have said in the Boom case, that the owner of the three islands in the Mississippi River, which together with the west bank of the river owned by the Boom Co., were capable of being constructed into a boom of enormous dimensions, could never have used his islands for boom purposes, and had only "mere hopes," that the Boom Co. would ever require his land for such purposes.

The claimant in this case, had he been permitted to introduce evidence, could easily have shown that the

probability of the City of New York, the State of New York, other cities and private capitalists taking this property for water supply purposes, was almost certain, that it had in fact been thoroughly agitated, had affected the public mind, and had affected the fair market value at the time the property was taken, if indeed any such immaterial questions have any bearing one way or the other.

The Appellate Division say before the claimant is entitled to recover any enhancement in the value of this property due to its adaptability for water supply purposes, it must be proved that the public mind was affected, and for that proposition, cite *Matter of N. Y. L. & W. R. Co. v. Arnot*, 27 Hun, 151. That case did not so hold and counsel believe the Appellate Division fell into error, on account of reading only an extract from the opinion in that case, and on account of its overlooking some of the facts therein. The facts in that case were, that the claimant owned a 26 acre farm. The railroad took a $3\frac{1}{2}$ acre strip of his land running diagonally through his farm. The whole farm was assessed at \$8,500. The claimant was awarded \$17,500 damages for the $3\frac{1}{2}$ acres, in addition to damages to the balance of his property. He claimed the damages should be measured by the injury to each lot, into which the farm was capable of being subdivided, whereas the Railroad Co. claimed, that the damages should be measured by the injury to the whole tract as a tract, taking into consideration, however, the value of the whole tract for building lot purposes. The Court there said:

"One element of value in respect of the whole property and in respect to the residue may be in a proper case, the facility or difficulty of division; if the land is at the time valuable

for city lots. But the mere hopes of an owner that his field may one day *be built upon*, are not to be considered, unless the probability of such an event in the public mind had in fact affected the fair market value."

That is, it was the hopes of the owner that his property, as divided into building lots would be built upon, not that his property was not at that time, available and adaptable for building lot purposes.

Not only is the property in the case at bar, available and adaptable, but it has a present *intrinsic value* inherent in the property itself and *capable of proof*.

In *Gearhart v. The Clear Spring Water Co.*, 202 Pa. St., 292, the highest Court of Pennsylvania said at p. 296:

"The attempt on the part of the defendant was to limit the proofs to the value of the farm land in the vicinity, on the theory that this piece of land has no value, as the defendant owned or had obtained options on the land which surrounded it, without which this piece could not be used in the building of the reservoir.

* * * * *

There was a demand for land on which pools for the formation of an ice pond could be made. Here was a new use which created a market for land with which its value for cultivation had nothing to do. The location alone fixed the value."

So we say here, the location and character of this land, its elevation at 600 feet above the sea level, the streams running through it and tributary to it, and the character of the water contained in those streams, as well, as the other surrounding conditions, fix the value of this land, and make it more valuable, than other farm land in the vicinity.

The offer made by the claimant, is broad enough in every respect, to show that demands for this property for water supply purposes on the part of private corporations and municipalities had enhanced or affected its value long before it was appropriated by the city.

In support of their position, that they have the right to deprive the owner of this element of value inherent in his property, the Appellate Division cite *Black River & Morristown R. R. Co. v. Barnard*, 9 Hun, 104. A mere inspection of that case will show that it has no application to this. There, a Railroad Co. obtained a right of way over the claimant's land, and expended \$4,000 or \$5,000 in excavating, so they could run their tracks over it. The Railroad Co. then abandoned the project. Thereafter, another Railroad Co., the petitioner, acquired the land for railroad purposes, and the owner claimed that he was entitled not only to the farm value of the land, but, also to the \$4,000 or \$5,000 additional, which the first Railroad Co. had expended on the land. This contention was held to be untenable. Those are the facts, and that is all the case holds.

The Appellate Division further cited *Matter of Boston, H. F. & W. R. R. Co.*, 22 Hun, 176, where they say, quoting from the opinion in that case:

"The situation of hills and streams often determines as a matter of necessity, where a public road must be built. If it must go through some narrow pass, where the land is owned by one person, he must be made to give up his land for the public benefit. All that he can have is compensation. Now, if the railroad company are to pay what the piece of land is worth for 'railroad purposes,' and if the road must be built through the pass, then they must pay any sum which the prospects of a successful road

will warrant. For the land would be worth for railroad purposes, any sum however large, which would not actually prevent the building of the road. Such a rule would do away with nearly all the benefit of the compulsory power of eminent domain. It would be given more than compensation."

The claimant in this case has made no such absurd contention.

If the Court, in that case, intended to hold that the "narrow pass" had no greater value than surrounding country property, not so advantageously located and not adapted for railroad purposes, we contend that Court erred.

The law, however, laid down by that learned Court, was absolutely correct, but is not applicable here. Contrast that decision with the opinion of the Hon. Willard Bartlett, in *Matter of Gilroy*, and take the two opinions together, and we have a complete and correct exposition of the law. In the *Matter of Gilroy*, at p. 426, Judge Bartlett says:

"Here was a narrow strip of land, said Boardman, J., formerly used as a way and only of value for a way. The owner holds it for such purpose only, expecting the time will presently come, when he can utilize it to his own profit, or sell it to some one else for such purpose. Why then are not the purposes for which it is held and the uses to which it is adapted, proper elements in its value? The same question may be asked with reference to Lake Gilead in the present proceeding. To ignore its adaptability to furnish water to the City of New York is to leave out of consideration the most important element which gives it any value in the market. The doctrine that the fitness of lands for particular purposes is an element in estimating their market value in con-

demnation proceeding, is supported by the decision of the United States Supreme Court in the case of *Boom Co. v. Patterson*, 98 U. S., 403."

The "narrow pass" unquestionably has a greater value than other agricultural property, because of its availability and adaptability for railroad uses and purposes.

Such property may be used for agricultural purposes, the same as other agricultural property, and in addition to such use, may be used for railroad purposes. Its use for railroad purposes would be so profitable, that the profits to be derived from its use for agricultural purposes would sink into insignificance in comparison. That any prudent owner, would not sell such property at ordinary farm values, cannot be doubted and yet the position of the Courts below is that the Courts of this State will compel an owner to do what the common sense of mankind tell him not to do.

The value of this narrow pass, is neither the value of ordinary similar farm land, not so located and adapted to be profitably used by railroad companies at a great saving to them, nor the value of the land to the railroad company for "railroad purposes." But its value is something more than its agricultural value. That it has some enhanced value over and above other country property not suitable, available or adaptable for railroad purposes, cannot be gainsaid, and the learned Court in the Matter of *Boston, H. W. & W. R. R. Co.*, *supra*, did not hold that the "narrow pass" did not have an enhanced value, but held only that its value could not be measured solely by its value to the railroad company for railroad purposes.

In the Matter of *Staten Island R. Co.*, 10 N. Y. State Rept., 393, 395, the learned Court said:

"Any prudent proprietor seeking to decide the price at which he would be willing to part with his estate, would be chiefly, if not entirely, controlled in his decision by the knowledge that his property presented special advantages which would eventually cause great corporations to struggle for their possession."

There is an unbroken chain of authorities of the highest Federal, State and English Courts, following and approving the doctrine of the Boom and Gilroy cases, and upholding the appellant's contention.

In *Great Falls Manufacturing Co. v. United States*, 112 U. S. Ct. of Cl., 645, aff'd, 112 U. S., where the City of Washington was acquiring water supply property for an addition to its water supply, and where there had been no prior demands for the property for such purposes and no inflammation of the public mind, the Court affirming the opinion of the Court of Claims, 16 U. S. Ct. Cl., 160, 190, 199, approved the following:

"It is no answer to this view to say that the claimants could not have themselves made as advantageous use of this property. That objection is at once met by retorting that the government could not have made as advantageous use of any other property of a like nature which was indispensable to the objects to be attained. The substitution of such other property would have involved the expenditure at the very lowest estimate of double the amount of the cost of the works as they have been located. It is not pretended that the damages of the claimant are to be measured solely by the savings of the government, but such savings are not to be lost sight of in determining the value of the property."

In the Gilroy case, Judge Bartlett reviewed many of the best decided cases on this subject in this coun-

try, and approved the doctrine of the Boom case, which the learned Special Counsel says, is bad law, and Judge Bartlett expressly stated in his opinion:

"A similar rule as to the measure of compensation where the power of eminent domain is exercised for the acquisition of reservoir sites has been laid down in the number of cases. *San Diego Land Co. v. Neale*, 78 Cal., 63; 20 Pac., 372; *S. V. Waterworks v. Drinkhouse*, 28 Pac., 6811; *Alloway v. City of Nashville*, 88 Tenn., 512, 13 S. W., 123. In the case last cited, it is well stated that market value includes every element of usefulness and advantage in the property. If it be useful for agricultural or residential purposes, if it has adaptability for a reservoir site or for the operation of machinery.

* * * * *

If it possessed advantages of location or is available for any useful purpose whatever, all these belong to the owner and are to be considered in condemning its value.

Without further citation of authority I think it is sufficiently clear that the Commissioners in the case at bar erred in excluding from consideration, an essential element in the market value of the property under condemnation. That is to say, its adaptability to furnish a portion of the water supply of the City of New York. It follows that their report should be set aside."

Opposing counsel concede, that the Gilroy and Boom cases directly apply to the case at bar, and do not attempt to distinguish them, holding them to be bad law. The Appellate Division ignores them, but the Special Term attempted to distinguish the Gilroy case from this, and a brief reference will be made to the attempted distinctions.

It is first necessary to understand the facts in the Gilroy case. The facts are: Lake Gilead contained 122 acres and 10 rods. 120 acres of the upper part of the bed were owned by five women. The City had acquired two acres and ten rods of the lower part. The City was condemning the bed of the lake. The City had already acquired the use of the water in the lake (see Opinion). The Commissioners awarded \$4,200 for the fee of the bed, or about \$35 per acre. The Commission in that case in awarding \$35 per acre, did not take into consideration, its adaptability for water supply purposes and for that reason the Court set aside the award as having been made on an erroneous theory.

In this case this claimant is awarded for his land \$32 per acre. Bearing these facts in mind look at the Special Term distinctions. The first is that the City was condemning a portion of Lake Gilead. This distinction, if of any value, is based upon a false premise. The City was condemning the bed of Lake Gilead or the reservoir site.

Could it be pretended that if Lake Gilead had been dry, and if a stream containing pure and wholesome water flowed in close proximity to it, so that the water could be made at a small expense to flow into it, that the learned General Term in the Gilroy case would have decided differently?

Another alleged distinction advanced by the Special Term, is that the difference in the number of owners makes a difference in principle. In the Gilroy case, there were five owners, whereas in the case at bar, there are 1000 owners.

While a difference in the number of the owners may make a difference in the value of the property, because it would cost a purchaser more money

to obtain the property from a larger number of owners, surely there can be no difference in principle whether there are two owners, ten owners or two thousand owners. If there is such a difference in principle, where will the Courts draw the line? If a large part or the bed of Lake Gilead had been owned by 5000 owners instead of by five owners, would the case, as a matter of law, have been different? This question answers itself. Such a distinction has been termed by the highest Court of California to be ridiculous.

In *San Diego Land Co. v. Neale*, 78 Cal., 63, at pp. 72, 73, the Court said:

"Suppose, for illustration, that the two sides of a canyon suitable for reservoir purposes were owned respectively by two persons who are joined as defendants in a proceeding to condemn land by a water company which did not own any of the property. It would not be pretended that such company could take the property at its value for grazing or agricultural purposes (which value might be nominal) merely because it was owned by different persons. Such a proposition would be ridiculous."

See also *Rankin v. Town of Harrisonburg*, 52 S. E., 155.

If such were the law, it would follow that if a single individual owned this entire reservoir site, its adaptability, as a source of water supply could be taken into consideration, but the minute the owners should by deed grant separate and divided interests in the property to a large number of others, or should die and devise many separate estates therein to others, this element of value would *ipso facto*, disappear.

Another attempted distinction by the Special Term was that in the *Gilroy* case, that facts existed

showing that it had become fairly well known that lakes and ponds of fresh water, were desirable property to hold in the section above the Croton River, where Lake Gilead was situated, as it was likely to be desired by the City of New York, and a good price realized thereon and a market value was thus created. In other words, the learned Judge holds if such value exists, and it is not known, the owner may be deprived of it. However, in this case, the claimant made an extensive offer for the very purpose of proving that this property was known to be desirable for water supply purposes.

Another attempted distinction by the Special Term is that Lake Gilead is in Putnam County, whereas the Ashokan Reservoir is in Ulster County.

Is it possible that there can be any difference in principle whether water supply property is in one county or in another? Is a water supply for which a demand exists, valuable 50 miles from the city desiring to use it, and valueless 90 miles therefrom, even though the supply, 90 miles distant is better and cheaper than the one 50 miles distant? As a matter of fact, such attempted distinctions rest upon no sound or reasonable basis, and were not made in either the Boom or Gilroy cases, and are not made in any of the other well decided cases in this country.

The Ashokan Reservoir site will furnish a greater daily supply of water than all of the City's other sources of supply combined. The City now receives a supply of about four hundred million gallons per day from all of its sources of supply. From this single source, it will receive a daily supply of five hundred millions per day.

In the Burr-Herring-Freeman Report, published in 1900, it is estimated that the cost of constructing a five

hundred million gallon aqueduct from the Adirondacks to New York City, is \$93,253,000. This cost is for the construction of one hundred and eighty-eight mile aqueduct and conduit only, and has no regard to land value or damages. The same Commission estimates the cost of an aqueduct to carry the same amount of water from the Ashokan at thirty-five million dollars. This cost is for the construction of 86 miles of conduit and aqueduct, and also has no regard to land value or damages. Thus, there is an actual saving to the City in the cost of the construction of a aqueduct and conduit alone from the Ashokan, of fifty-eight million two hundred and fifty-three thousand dollars, and it must be noted that this great saving does not include the saving of the many millions of dollars, that it would cost the city, if it were compelled to get this supply from the Adirondacks on account of the great amount of additional land covering the greater distance from the Adirondacks to the City, requiring the devastation and use of many thousands of acres of additional land, not to speak of further saving to the City in the matter of construction, and interest on the enormous investment of money pending construction. In addition to all this, there is not in the whole of the Adirondacks, as large and suitable a site on account of the elevation and for other reasons, as the Ashokan.

It would be manifestly unfair on the part of the claimant to demand his proportionate share of the percentage of the saving effected by the City in adopting a shorter, cheaper and more available site over the longer and more expensive one. That is not our contention, yet it would be made to appear that we are demanding part of the benefits gained by the City. Nothing is more remote or farther from our conten-

tions or the truth. Claimant asks an opportunity of showing how adaptability affects market value and that some part of the increased value, whether it be great or small, to be determined upon evidence, be allowed the owner, unless he is to be deprived of his property without just and equitable compensation, in violation of the Constitution of the United States, and of every principle of right and justice.

The law in Great Britain on this subject is the same as that laid down in the Boom and Gilroy cases. In Cripp's 4th Ed., on The Law of Compensation, the learned author, p. 108, referring to special adaptability, states:

"It must, however, be clearly understood that special adaptability does not imply any deviation from the principles to be applied in all compensation cases. An owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return, and the term special adaptability only denotes that the probable use from which the best return may be expected is special in its character. The question has generally arisen in connection with reservoir sites, where from natural physical causes, land is situated and probably may be used for the construction of a reservoir."

Opposing counsel attempt to distinguish the Boom case, although they state it is not in line with the best authority, by saying that the Boom case is one of special adaptability, while the case at bar is one of general adaptability. In inventing these new and useful terms, they defined general adaptability to mean a case where it is necessary to spend money in order to make property commercially profitable for some purposes, whereas special adaptability is a case where it

is not necessary to spend money. In other words, in the Gilroy case, they would ask the Court to believe that the City could obtain the water from Lake Gilead, without spending any money. In the Boom case, they would ask the Court to believe that the Boom Co. could use the islands for boom purposes without spending a penny. As a matter of fact, there is probably no instance to be found where any vacant property can be made commercially profitable without the expenditure of some money. In the Gilroy case the City had to lay pipes and to expend considerable money in construction work, and in the building of dykes and dams, and in the Boom case, the Boom Co. had to join the islands to the west side of the Mississippi River by artificial means and had to expend large sums of money in construction.

The unhampered interpretation and administration of the law, regardless of prejudice or consequences, is the highest public policy.

Under our system of government, the duty devolves upon the Courts of justice to interpret and apply the law. If the Courts legislate, they have the power to deprive citizens of their property, because the Courts have the last say from which lies no appeal. The Courts are therefore the final arbiters of life, liberty and property. The hope and foundation of free government is confidence in the Courts. The people feel that in the highest State and Federal Courts, cases are decided upon the law. The people feel that in these Courts no appeal to prejudice, passion or bias can succeed. The people feel that in these Courts the humblest citizen will receive as much consideration as the State or one of its large cities where disputed rights are in question between him and them.

The decision of the Court in this case will be of the most far reaching effect. It will apply not only to condemnation cases, but to all cases wherever the value of real property comes into question, now and hereafter.

It was argued by opposing counsel at the bar of the lower Courts, that if the claimant's contention were upheld, the City of New York and other municipal sub-divisions of the State might in the future, whenever they desired additional reservoir sites, be compelled to pay many millions of dollars more than they would if the claimant's contention were overruled.

Is it conceivable that the Courts will confiscate property, because, forsooth, if they do not the public will have to pay its real value?

In this tribunal, we are convinced that no considerations outside of the evidence and the facts, will enter into a decision, and it is upon these facts, and upon the application to them of the well established principles of law, uniformly applied in similar cases, in an unbroken chain of authorities of the highest Federal, State and English Courts, that the plaintiff in error relies.

Another reason urged for excluding this evidence, is that, the availability and adaptability of the property for water supply purposes is conclusively presumed in these proceedings. This is another point on which the Appellate Division followed the reasoning of the City's counsel and in which we believe that learned court has fallen into error. Is an admission of adaptability, an admission of the extent to which the market value of the property is enhanced by reason of the adaptability?

It is useless to admit availability and adaptability, without showing all of the surrounding circumstances and conditions to prove exactly how availability and

adaptability must necessarily enhance the market value of the property.

In one part of its opinion, the Appellate Division says the Commissioners of Appraisal must take this element of value into consideration, and in another part of their opinion, they say it was not error to exclude the testimony offered, as those facts were stated in the petition, and no issue was raised over the question of a demand on the part of the City of New York or the availability and adaptability of the property, although says the learned Appellate Division:

"It is probably true that the Commissioners might properly have received evidence tending to show that the Ashokan Reservoir site is the cheapest, best and most available site for water supply purposes and for furnishing water to the City of New York."

Why should these Commissioners of Appraisal allow such evidence, if the Court holds that after allowing it, they must not take it into consideration because it proves only what is admitted?

SECOND POINT.

Market value is not always the true measure of just compensation.

Market value, in the sense of what property will bring, as between a willing seller and a willing purchaser, cannot be relied upon as the sole measure of just compensation, as between an unwilling seller and a willing purchaser.

As stated in *Sargent vs. Town of Merrimac* (*supra*), there is no market value in the strict sense of the term

for real estate, and especially for country real estate.

In *Sloane vs. Baird*, 162 N. Y., 327-30, the Court said:

"The market value of property is established when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed. Bouvier, in his law dictionary, defines market value as a price established by public sales, or sales in the way of ordinary business, as all merchandise. The Century Dictionary defines market price as being the current price" (See also *Murray vs. Stanton*, 99 Mass., 345-348).

It is perfectly obvious in a case like this that it would be a practical impossibility to establish a market value for this reservoir site as such, or for any of the portions of land that compose it, in the ordinary ways that market value are established.

There is no "other property of the same kind (which has or could have been) the subject of purchase or sale" to establish a market value, and the fact that there is no other property of the same kind, that is susceptible and adaptable to the same use, is what gives to this property its peculiar value, an actual, intrinsic value.

It may have no present market value for the special use that makes it of particular value, but, as stated by Mr. Justice Boardman in the Matter of N. Y. L. & W. R. R. Co., 27 Hun, 116, the owner holds it for such purpose only, expecting the time will presently come when he can utilize it for his own profit or sell it to someone else for such purpose. Why, then, are not the purposes for which it is held and the uses to which it is adapted proper elements in its value?"

As stated in *Langdon vs. Mayor, supra*:

"It is the potentialities of a given piece of property, both developed and undeveloped, which constitutes its chief element of value."

It may well be that there is only one person or one corporation capable of availing itself of that chief element of value. Is, then, the owner to be deprived of having that element of value at all considered, because there is no market value that can be established; only a single purchaser; and that that purchaser may secure this property of great value by simply paying for it what it is worth without that element of value? That such value is not to be shared in any proportion between the owner and the party condemning it?

The difficulty of establishing the market value of property, particularly property that is valuable for a special use, has been recognized, and market value has been recognized as not necessarily affording the true measure of just compensation.

In the Matter of Furman Street, 17th Wendell, 648, at page 671, the Court said:

"There can be no other practical guide for the commissioners than the *intrinsic* value of the land; and that value depends upon the *uses* to which it may be applied, *or* the price which it will bring in the market."

Mr. Justice Cullen in the *Matter of Daly vs. Smith*, 18 App. Div., 194-7, recognized the same distinction between market value and intrinsic value, saying:

"It is doubtless true and settled by authority, that the land owner is not limited in compensation to the use which he makes of his property, but is entitled to receive its greatest value for any purpose. But still, there is the market value of the property; that is, the meas-

ure of the compensation. When, therefore, it is sought to show that a tract of land has a use for a particular purpose, it must also be shown that it is marketable for that purpose, *or has an intrinsic value*. If on a farm there is a quarry or a deposit of ore, the owner would not be limited to the value of the land as a farm, but would be entitled to compensation for the quarry or mine if it enhanced the value of the land. But that the stone of the quarry was good, or the ore rich, if the location of the land was such, either from lack of transportation facilities or for other reasons, as to render the quarry or deposit of no practical advantage or value, then he would be confined to the value of his land for farming purposes."

In this case, we have property of value for reservoir purposes, peculiarly adapted and available for such purpose, and there are those who can use it for such purpose, and the fact that the principal one who can use it for that purpose is the one who is actually condemning the property does not deprive us of the right to be compensated for such value.

THIRD POINT.

The adaptability of land for use as a reservoir or for water purposes has been taken into consideration as an element of value of such land in a number of well decided and carefully considered cases, both in Great Britain and in the United States.

In a very well considered work, entitled "Law of Compensation," by C. A. Cripps, Q. C., Fourth Edi-

tion, published by Stevens & Sons, Ltd., in 1881, and brought down to 1900, the author states the law conservatively as follows:

"The general principle has been applied in a certain number of particular cases under the name of special adaptability. It must, however, be clearly understood that special adaptability does not imply any deviation from the principles to be applied in all compensation cases. An owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return, and the term special adaptability only denotes that the probable use from which the best return may be expected is special in its character.

The question has generally arisen in connection with reservoir sites, where from natural physical causes land is suited and probably may be used for the construction of a reservoir. In *Riddell vs. New Castle Water Co.* (held in the Court of Appeals on 13 of June, 1879, but not reported), an award was upheld by the Court in which the arbitrator had taken into consideration the peculiar value of the lands on account of their fitness for the purpose of a reservoir or a water supply. This case was referred to in the subsequent case of *Manchester Corporation vs. Countess Ossalinski* (held in the Q. B. D. of the High Court on 3, 4 April, 1883, but not reported). An application was made by the corporation to set aside the award on the ground that the arbitrator had taken into consideration the enhanced value of the land on account of its capability of being used as a reservoir; but it was held that this enhanced value might probably be taken into account as an element of value, just as the probability that by the extension of a town agricultural land would acquire an enhanced value as building land."

The Ossalinski case will be found in the Appendix hereto.

In the matter of Gilroy, 85 Hun, 424, the Court said:

"The Commissioners practically held that the availability of the property for use in connection with the water supply of New York City could not be taken into account by them in determining what was the fair market value of the premises. In so doing, it seems to me they disregarded the great weight of authority as to the proper measure of compensation in cases of this kind. * * *

" 'Here was a narrow strip of land,' said Boardman, J., 'formerly used as a way and only of value for a way. The owner holds it for such purpose only, expecting the time will presently come when he can utilize it to his own profit, or sell it to someone else for such purpose. Why, then, are not the purposes for which it is held and the uses to which it is adapted, proper elements in its value?' The same question may be asked with reference to Lake Gilead in the present proceeding. TO IGNORE ITS ADAPTABILITY TO FURNISH WATER TO THE CITY OF NEW YORK IS TO LEAVE OUT OF CONSIDERATION THE MOST IMPORTANT ELEMENT WHICH GIVES IT ANY VALUE IN THE MARKET."

Then after citing case of Boom Co. vs. Patterson, 98 U. S., 403, and a number of other cases, the opinion proceeds:

"Without further citation of authority I think it is sufficiently clear that the Commissioners in the case at bar erred in excluding from consideration an essential element in the market value of the property under condemnation, that is to say, its adaptability to furnish

a portion of the water supply of the City of New York. It follows that their report should be set aside."

In Matter of Daly, 72 App. Div., 396, the Court says:

"It was proper to consider as an element in the market value of the property to be taken the existence of a demand for such property on the part of the City; this does not authorize an inquiry as to what that particular property was worth to the City."

In *re* Gough Law Reports, 1 Kings Bench, 417 Lord Alverstone, writing the opinion of the Court, said:

"Naturally the peculiar adaptability of the land for a reservoir should be taken into consideration in fixing the compensation to be awarded."

In the Trustees of College Point vs. Dennett, 5 N. Y. Sup. Ct. (T. & C., 217), the village sought to acquire the right to take water from Casina Lake for its water supply, and the Court held that the owners were entitled to be compensated upon the basis of the value of the pond for furnishing a water supply to villages. The Court said, page 218:

"It was not for the appraisers to limit the value of the pond proposed to be taken as a mill pond or as an ice pond. If it had a value for any other purpose in excess of the value for such purposes, it would be the right of the land owners to receive such value by the award of the Commissioners. For the purposes of this appeal we must assume that the value was greater as a fresh water pond to supply water to the villages than for any other purpose. Such being the case, the Commissioners proceeded upon an erroneous principle."

In *Gearhart vs. The Clear Spring Water Co.*, 202 Pa. State, 292, a water company was condemning for a reservoir land which was part of the bottom of a natural basin, situated in an elevated and mountainous section of the country. It had but little value, as farm land, or, for any purpose, other than that for which it was taken, but, for that purpose, it was valuable, and without it a reservoir could not be built at that place. The Court said:

"An attempt was made on the part of the defendant to limit the proof to the value of the farm land in the vicinity on the theory that this piece of land had no other value as the defendant had obtained options on the land which surrounded it without which this piece could not be used in the building of the reservoir."

"There was a demand for land on which pools for the formation of an ice pond could be made. Here was a new use which created a market for land with which its value for cultivation had nothing to do. *The location alone fixed the value.*

"What the petitioner was entitled to receive was the fair market value of the land of her testator as it was at the time of the taking. Market value in this connection does not mean the same thing that market value means when the market value of flour or other things dealt in daily in the market is spoken of. A lot of land cannot have a market value in that sense of the word. What is meant by the market value of land is the value of the land in the market; that is to say, for the purposes of sale.

"The market value to which the petitioner was entitled was made up of the value of the land apart from its special adaptability for water supply purposes, plus such sum as a purchaser would have added to that value because of the chance that the land in question might

be some day used as a water supply. *Moulton vs. Newburyport Water Co.*, 137 Mass., 163."

THIRD

Boom Co. vs. Patterson, 98 U. S., 403, at p. 408:

Note.—While the rule as to market value in Massachusetts is as above stated, it is also there held that whether the presiding Judge shall admit evidence as to the additional sum a purchaser would pay for such special use and adaptability thereto, is within his discretion, which will not ordinarily be interfered with on appeal.

While such evidence is held to be relevant, and that it would shed light on the issue on trial, the objection is stated to be, that it may involve the trial of collateral issues; and for that reason it is said to be incompetent; and a distinction is made between adding to the ordinary value of land, its value for a special use or purpose, for which it is available and adaptable because it is peculiarly available and adaptable to such use and purpose, and adding to the ordinary value of land, an additional value simply because it has been taken for such special use or purpose; and it is said that the minds of the jury are apt to be distracted, if the presiding Judge admits evidence of the value of the land taken for the special use or purpose for which it is taken, and at the same time tells them, as he is bound to tell them, that nothing is to be added to the value of the land by the fact that it is taken for such special use or purpose.

Sargent v. Merrimac, *supra*.

Conness v. Commonwealth, 184 Mass., 541.

There is a plain distinction between adding to the ordinary value of land its value for a specific use or purpose, and enhancing its value because of the simple fact that it is taken for that purpose or use, and not because it is intrinsically valuable for that use, whether taken for that express use or not.

FOURTH POINT.

The fact that the plaintiff-in-error did not or could not alone use his property as a reservoir site does not deprive that property of its value as a reservoir site or a portion of a reservoir site.

In the Boom Co. case, this Court said:

“Property is not to be deemed worthless because the owner allows it to go to waste or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the interests or conveniences of life. Its capability of being made available gives it a market value which cannot be easily estimated.”

This case was followed in Great Falls Manufacturing Co. vs. United States, 16 U. S. Ct. Claims, 160, the Court saying, pages 198, 199:

“Guided by the light of this authority, it is not difficult to reach a result in the present instance. The adaptability of the claimant's land and of their water privileges to the purposes to which they have both been applied by the Government constitute a proper element to be taken into account in estimating their value. It is no answer to this view to say that the claimants could not have themselves made as advantageous use of this property. That objection is at once met by retorting that the Government could not have made as advantageous use of any other property of a like nature which was indispensable to the objects to be attained. The substitution of such other property would have involved the expenditure

at the very lowest estimate of double the amount of the cost of the works as they have been located. It is not pretended that the damages of the claimant are to be measured solely by the savings of the Government; but such savings are not to be lost sight of in determining the value of the property."

(Aff'd, 112 U. S., 645.)

In *C. N. W. Railroad Co. vs. C. & E. Railroad Co.*, 112 Ill., at page 609, the Court said:

"In condemnation proceedings the owner of the property taken is not required to make any pecuniary sacrifices at all. He is entitled to whatever the property is worth to him, *or any-one else, for any purpose* to which it is adapted, but the special uses or purposes to which the property is adapted must be real—that is, founded on facts capable of proof,—and not merely speculative or imaginary."

In *Hooker vs. N. & W. R. R. Co.*, 62 Vt., 47, 48, 49, the Court said:

"Its market value depends not wholly upon the use to which the owner is putting it, but upon the use or uses for which it is available at the time it was taken. If it is available for a marble or granite quarry, a coal or gold mine, or for building lots, rather than pastures, although not used for any of these purposes, or left unused by the owner, the use to which it may be put profitably, must of necessity enter into consideration in determining the market value of the premises."

To the same effect is a well-considered decision in an Arkansas case (*Railway Co. vs. Woodruff*, 49 Ark., 381, 5 S. W., 792), where the land was to be condemned for the location of a railroad bridge. The contention was that as the defendant had no

right to bridge the Arkansas River while the plaintiff possessed such right, the defendant as owner could not have any damages based upon a use *to which he could not put the property himself*. The Court, however, *refused to adopt this view, holding that the probable demand there may be for suburban property for depot and bridge sites is a recognized factor in the market value of such property.*

In *Mississippi Bridge Co. vs. Ring*, 58 Mo., 491, the Court said:

"The correct rule to be applied relates to the value of the land to be appropriated which is to be assessed with reference to what it is worth for sale in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to have it."

FIFTH POINT.

The fact that the plaintiff-in-error was the owner of only a part of the reservoir site does not prevent that element of value being considered. It only goes to the weight that should be given to the evidence and the amount that should be allowed for this element of value.

In the *Gilroy* case, 85 Hun, 424, there were five owners.

In the case of the *Boom Company vs. Patterson*, there were several owners, and in the English cases there were various owners of the property.

If such were the law, it would necessarily follow that if a single individual owned this entire reservoir site, its desirability for water supply purposes and the existence of a demand for it for such purposes would be competent evidence, as an element entering into its market value; but, if the owner should by deed grant divided interests in the property to a large number of others, or, if he should die and by will devise many separate estates, it is to others, this element of value would, *ipso facto*, disappear. It must appear from this illustration, that such a principle of law is unknown. Not only has it been urged and decided adversely to the City's contention in many cases above referred in this brief, but in the Gilroy case it was deemed unworthy of mention by the Court.

It was claimed, in substance in the court below, that if land alone is taken, the case is different, and the principle is different, than when land, and a stream are taken, together. In other words, if one man owns a complete reservoir site, but, not an adjacent stream, which may be made to run into, and supply it with water, and the reservoir site is first condemned, it must be valued, as country property, and not as reservoir site property; whereas, if the reservoir site and the stream are condemned, together, the reservoir site may then be valued, as reservoir property.

The learned English Court which decided the Tynemouth case did not make any such distinction. On the contrary that Court said, page 559:

"On the other hand some appreciation of the claimant's land undoubtedly flows from its situation being such as fits it for being of a higher value for reservoir purposes if taken in conjunction with other lands than it would

have had if there were no such other lands for it to be taken with.

"It seems to me obvious that there must be some gain in value, and I cannot think it would possibly be right to say that the land of one of these claimants should be treated as if it had no reservoir value merely because apart from the other lands it would have none.

"You might just as well say that a complete reservoir site had no reservoir value because the owner of it did not own the land or the water course below the reservoir which is necessary for the flow of the waters to the places where the waters would be of utility. I cannot see any distinction between the two things."

In that case there were three owners.

In *San Diego Land and Town Co. vs. Neale*, 78 Cal., 63, the Court had under consideration a case on all fours with the case at bar, where land was being condemned by a private water company, for the purpose of obtaining an additional supply of water. The claimant's property was grazing or farm land in the Sweet Water Valley, and together formed a natural reservoir site. The claimant's land, considered as agricultural or farming land, was of nominal value. An award of \$280 per acre, for his land, however, was sustained by the highest court of California, the Court saying (78 Cal., 63, pages 72-73):

"While it is true that the defendants' property had no value for reservoir purposes except in connection with the land of the plaintiff, it is equally true that the plaintiff's property had comparatively little value for such purposes except in connection with the land of the defendants; the plaintiff's own evidence being that with the defendants' land including the reservoir will hold about six thousand million

gallons and without the land of the defendants it will hold only about one-tenth that quantity. And this being the case, we can see no more reason for saying that the plaintiff can take the defendants' portion without regard to its value for reservoir purposes than for saying that the defendants, if they had happened to commence proceedings first, could take the plaintiff's portion upon the same basis. The question of value is distinguished from the question of ownership." * * *

"Suppose, for illustration, that the two sides of a canon suitable for reservoir purposes were owned respectively by two persons who are joined as defendants in a proceeding to condemn the land by a water company which did not own any of the property. It would not be pretended that such company could take the property at its value for grazing or agricultural purposes (which value might be nominal) *merely because it was owned by different persons. Such a proposition would be ridiculous.*"

In the Ossalinski case (see appendix) it was contended that the land of the Countess would not make a reservoir because it did not go all around the lake, and because parts of the land were scattered about. The Court said:

"No doubt that is perfectly true, but then, at the same time, it contributes to it, it is absolutely essential to a reservoir, and no reservoir could be made in those parts without taking her land, any more than a reservoir could be made on her land without taking the land of other persons in the neighborhood."

The reservoir was to be constructed at Thirlmere. And the Court further said:

"Under whatever circumstances Thirlmere might be turned into a reservoir, it would be absolutely necessary that the Countess Ossa-

linski's land should be taken, and it seems to me to be improper to deprive her of the benefit derived from that circumstance."

So here the land of the claimant is a necessary part of the reservoir. To construct the reservoir in question it is absolutely necessary to take the claimant's land, and he is entitled to the benefit to be derived from that circumstance.

SIXTH POINT.

By refusing to take into consideration, in estimating the value of the claimant's property, the value of its use or availability for use as a reservoir site, the plaintiff-in-error has been deprived of his property, without due process of law, and has been denied the equal protection of the law in violation of the 5th and 14th amendments of the constitution of the United States.

This constitutional question was squarely raised from the beginning to the end of the litigation, before the Commissioners of Appraisal, and all of the State Courts, in written objections, and otherwise, as well as in oral arguments and in briefs.

The use to which property can be put and the value of such use constitutes property, and in condemning property, without considering as a part

of the compensation to be awarded therefor such use, or the value of such use, or permitting the owner to give evidence thereof, is depriving the owner thereof of his property without due process of law, and is in violation of his right as guaranteed by the Constitution of the United States.

"The * * * limitations upon the power of the general government expressed in the fifth amendment is to be read with the fourteenth amendment prohibiting the States from depriving any person of property without due process of law and from denying to any person within their jurisdiction the equal protection of the laws. The amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the management of their rights."

Yesler vs. Board of Harbor Civil Commissioners, 146 U. S., 646.

Again,

"Due process of law requires, that a party shall be properly brought into Court, and that he shall have an opportunity when there, to prove any fact which according to the Constitution and the usages of the Common Law would be a protection to him or his property."

People ex rel. vs. Supervisors, 70 N. Y. 228-34.

In these cases the claimants have not been permitted to prove either the market or the intrinsic value of their property as a reservoir site, have not been permitted to prove those characteristics or quality of their property which make it valuable as a reservoir site, and the Commissioners have refused to take into consideration its availability or

adaptability as a reservoir site, or any facts which make it either available or valuable for such purpose, and in making their award have excluded all such elements of value, and to that extent have deprived the claimant of his property without due process of law.

The refusal of the Courts below to take into consideration the adaptability of the property for water supply purposes and their exclusion of all evidence thereon amounts to a confiscation and is a violation of the fourteenth amendment of the United States Constitution.

The property is being condemned under the statute, (Chapter 724 of the laws of 1905). The statute provides that the owners of the property to be taken shall receive "just compensation." If adaptability of the property for water supply purposes is a part of market value, and if notwithstanding this, the commissions and courts do not consider it as such, but on the contrary, exclude and refuse to receive any evidence offered to prove this element of value, then it must necessarily follow that the Court construed the term "just compensation" as used in this statute, to exclude one of the most important elements of value in the property. If when other property is condemned for public uses under other state statutes, the Courts have construed and construe "just compensation" to include all elements of value, embracing the special adaptability of the property, as well as the general uses to which it may be put, then "just compensation" as used in this statute is more restrictive than when used in other statutes. In other words, the particular class of owners affected by this statute, receive less compensation, than other owners, affected by other eminent domain statutes, receive. Under such a construction of this

statute, this owner is denied the equal protection of the law, and the fourteenth amendment of the United States Constitution is violated. Furthermore, construing "just compensation" to exclude special adaptability, violates that other portion of the fourteenth amendment, which declares that no person shall be deprived of his property without "due process of law." It is not due process of law, where the Courts apply a rule of law, "in absolute disregard of the right to just compensation."

Chicago, Burlington and Quincy Rd. Co. vs.
Chicago, 166 U. S., 226.
Backus vs. Fort St. Union Depot Co., 169 U.
S., 557, 565.

The term "just compensation" as used in this statute should be liberally construed in favor of the property owner and in case of any doubt, the property owner should receive the benefit of the doubt.

Eminent domain statutes are construed most strictly against the condemning party.

Cooley on Constitutional Limitations.

See also:

Appleby vs. Buffalo, 221 U. S., 524-529, 530-531.

Twining vs. New Jersey, 211 U. S., 78-91.

Raymond vs. Chicago Traction Co., 207 U. S., 20-35-36.

Londoner vs. City of Denver, 210 U. S., 373-386.

In the case last cited, this Court referring to a tax proceeding, said, p. 386:

"But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argu-

ment, however brief, and if need be, by proof, however informal. *Pittsburg, etc. Railway Co. vs. Backus*, 154 U. S., 421-426; *Fallbrook Irrigation District vs. Bradley*, 164 U. S., 112-171, *et seq.*"

Chicago, Burlington & Quincy Ry. Co. vs. Drainage Commissioners, 200 U. S., 561.

The head note of the case last cited reads as follows:

"The failure of the State Court to pass on the Federal right or immunity specially set up of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny Federal right or immunity specially set up, or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

Atlantic Coast Line vs. North Carolina Corporation Commission, 206 U. S., 1, 20, 26.

Old Wayne Life Association vs. McDonough, 204 U. S., 8, 22, 23.

Missouri, Kansas & Texas Ry. Co. vs. Elliott, 184 U. S. 530.

Traction Co. vs. Mining Co., 196 U. S., 239, 251, 252.

Tindal vs. Wesley, 167 U. S., 204, 222.

Tullock vs. Mulvane, 184 U. S., 497.

From the foregoing authorities, it is clear that the acts of the courts of the State of New York are the acts of the State itself; that the judges of the courts are the agents of the State; that when these agents refused to award the plaintiff in error anything for the chief element of value in his property, their act was the act of the State, and the State has consequently deprived the plaintiff in error of his property, without just compensation.

In stripping the plaintiff-in-error of his property, without just compensation, the City of New York, through its Board of Water Supply, is acting under the power of eminent domain delegated to it by the State.

The capabilities of the property of the plaintiff-in-error, its adaptability and availability for use as part of a reservoir site, constitute commercial value and property. The term "property" means the right to use, exercise dominion over, and dispose of some particular thing or object. Property means ownership, the exclusive right of a person to freely use, enjoy and dispose of any object, whether real or personal.

Hamilton vs. Rathbone, 175 U. S., 421.

Buffalo vs. Babcock, 56 N. Y., 268.

In Matter of Jacobs, 98 N. Y., 98, affirming, 33 Hun, 374; 50 Am. Rep. 636, the Court, per Earl, J., said:

"Property * * * is owned and kept for some useful purpose, and it has no value, unless it can be used. Its capability for enjoyment and adaptability to some uses are essential characteristics and attributes, without which property cannot be conceived."

If the State of New York should pass a statute, prohibiting the owners of a reservoir site to use their property for water storage purposes, such act would undoubtedly be a violation of the 14th amendment of the United States Constitution, because it would deprive the owners of such species of property of their right to use their property for the most valuable purposes to which it could be put.

Can the State take such property, however, and write down over its own signature that it will not pay to the owners of such property one penny for the right to use it for reservoir purposes, even though that right is tremendously profitable to the State?

Will the State of New York be permitted to write down over its own signature, as it has done in the opinions in this case, that it will not pay the owners of this valuable reservoir site anything but the farm value of their lands?

If this Court will not interfere to prohibit such an outrage, then there is no longer any potency in the Constitution of the United States,

SEVENTH POINT.

For the foregoing reasons, the final judgment and the final order of the Supreme Court of the State of New York should be reversed, and a new hearing granted to the plaintiff-in-error.

Respectfully submitted,

Jerome H. Buck,
Attorney for Plaintiff-in-Error.

J. J. DARLINGTON,
GEORGE GORDON BATTLE,
EDWARD A. ALEXANDER,
Of Counsel.

APPENDIX.

Manchester vs. Countess Ossalinski.

In the case of Manchester vs. Countess of Ossalinski, a very exhaustive statement of the law applicable to the case at bar is contained in the judgment pronounced by Grove, J., and concurred in by Judge Stephen, who sat with him. In that case, which has not been reported, but the opinion in which may be obtained from the Town Clerk of Manchester, and which is set forth at length in a brief filed by James Dunne in the Court of Appeals of this State, in the Matter of Brookfield, 76 N. Y., 138, Judge Grove used the following language (Vol. 2043, N. Y. Law Institute Library):

"The only one of those that can apply to this case is the latter one, that the arbitrator has acted *ultra vires*. In other words, that he has made an element of his calculation of the value of his land that which cannot or ought not to be an element in its consideration, namely, the enhanced value of the land on account of its capability of being used for diverting and impounding water or of being converted into a reservoir or for any useful purpose for which persons would pay a substantial price. It appears to me that that in itself is not an objection to the award, and that, the arbitrator ought to take that into consideration. If the land has what I may call an adventitious value that is, something beyond its agricultural or normal value; and that is a marketable value in this sense, that persons wishing for a purpose for which the land is peculiarly applicable, to purchase that land, would give a higher price for that land, then the arbitrator has a fair right to take that into consideration; that is a matter no doubt contingent, but still it is a matter which is not to be ig-

nored or put out of consideration by an arbitrator. Land may be agricultural land, but it may be so near a town that it is tolerably certain that in a few years it will be converted into building land; quite certain in a large number of years so far as we can speak of anything in the future being certain; it will be converted into building ground. It is quite true that land may be rightly valued at more than its value as agricultural land if the land had any other capability for railway, canal or irrigating purposes, or for water works or for anything else, and they are reasonable and fair capabilities—not far-fetched hypothetical capabilities, but reasonably fair contingencies. These are fair things to be considered by an arbitrator; not to give its full value as if the thing of prospect were actually accomplished, but to give the enhanced value, or what it would sell to a willing purchaser in consequence of its having these additional advantages. I cannot agree with Mr. Davey, that this is not a matter which should be taken into consideration. I have difficulty in understanding his proposition, that if one line of land is more advantageous for railway purposes than another, that that land ought not to have an increased value as regards the other on account of its value for railway purposes, if it is in a district where there is a great probability or a reasonable likelihood of there being a railway constructed. It is quite another case when you come to the second head of objection here, namely, the particular value which the land has to one of the parties before the arbitrator. That is quite another ground. But supposing the general value is only given, if this land was probably certain within a reasonable time to be used for certain purposes which would give it a very much more enhanced value, that is a matter for the arbitrator to take into consideration. I am clearly of the opinion that

it is, and that the arbitrator has rightly taken that matter into consideration.

"Then comes the second head of objection, that the arbitrator has taken into consideration the increased value of the land in consequence of the powers conferred on the Corporation of Manchester by the Manchester Corporation Water Works Act, 1879, and has taken into consideration the value of the land to the Manchester Corporation used for the purpose of carrying out the objects of the higher powers conferred by the said act. That would be a serious objection to the award, and a fatal one, because as far as my experience goes it has been the invariable practice, sanctioned by the courts, that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under Parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that is to be excluded from consideration, and the only way it can or ought to be put forth at all is, as a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants before the arbitrators are going to put the land to when they take it under Parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument. That is a matter of fact. Did the arbitrator take this into consideration? As far as I can see he did not. At all events his award is perfectly consistent with his having not done so. And I cannot set aside an award

merely upon such possibility or guess that he might have done something wrong. * * *

The arbitrator says: 'And by way of special verdict and opinion of the High Court of justice, I hereby state and find as facts that the land and hereditaments, respectively, described and comprised in the said claim of the said owner, *have by themselves and in conjunction with other adjoining land a natural and peculiar adaptation for the collection, diverting and impounding of water as a suitable site for the construction of a reservoir.*' Now he gives the ground or rather the conclusions which he has come to in estimating the value of the land. 'I have in my award and determinations hereinafter contained in estimating the value of the land taken into consideration its enhanced value by reason not—by reason of the Manchester scheme, but 'by reason of the water that may be collected,' diverted and impounded upon the said lands and hereditaments of the said owner and also by reason of its natural and peculiar adaptation for the construction of a reservoir.' Now that alone certainly seems a fair and proper ground for an arbitrator to take into consideration. It does not at all apply in any way specifically to the Manchester scheme, but for any purpose the parties may for various purposes require the impounding of water or require a reservoir, or for many purposes, no doubt useful in this case, it might be for supplying water to towns more or less large, but at any rate they may require it for other purposes, and all he says is I have considered that has enhanced the normal value of the land because the land is capable of being so used. Of course an arbitrator cannot give it both ways. If he gives the enhanced value in that particular, he must deduct the agricultural value of the ground which is rendered useless for agricultural purposes by water which is impounded and made

to flow or lie over it. That he has done. I am not now entering on the rectitude of the values given by the witnesses, but that is one by the witnesses because when they give a particular value for the land they deduct from that the value they give to it as agricultural land, which is, roughly speaking, somewhere a third more. It does not appear that the arbitrator adopted their views—it is clear he did not. He adopted what turned out to be some mean between the values for the plaintiff and the values for the defendants, and that seems to me to be a right matter for consideration in itself, and there is nothing wrong on the face of the award in that respect."

In the opinion of Stephen, J., that learned judge says:

"What I understand him to have said, is this: That natural construction of this ground, a large part of which is owned by the claimant in this case, is extremely peculiar. It presents features so favorable for making a reservoir that they may be called almost unique, and that has been likened to a great number of things in the course of argument. The commonest, and perhaps the fairest, illustration that may be taken may be this—it is like the common case of building land. There is land on which buildings may be raised—it's an every day practice—here is land suited for building; here is a railway near it; it is the intention of the railway company to put a station in the immediate neighborhood which will enable people to build villas upon this land. Now, land so situated undoubtedly derives a considerable increased value from these circumstances, and if any person wishes to take that land, or, say, if another railway company wishes to come in and cut across it, no doubt they would have to pay NOT THE AGRICULTURAL VALUE

OF THE LAND, BUT THEY WOULD HAVE TO CONSIDER THE VALUE OF THE LAND AS BUILDING LAND, AND ALSO HAVE TO CONSIDER HOW ITS VALUE AS BUILDING LAND WOULD BE AFFECTED BY THE INTENTION OF THE RAILWAY COMPANY TO MAKE A JUNCTION OR TO BUILD A STATION IN THE NEIGHBORHOOD. As to this particular piece of land I will not say it is unique, but it is very nearly unique; it is one of the small number of places which is capable of being made into a reservoir which would supply any towns with which they might be connected. We all know that Thirlmere lies very high—perhaps I have a right to impart my own knowledge of the country into it, but I think it would be very much less than eight hundred or nine hundred feet above sea level—the top of the water—and with a large quantity of water at that level you might carry it to very nearly any large town in England, that being so it seems to me quite absurd to say that there is not a special value attaching to that particular matter, or to say that the Countess who owns a part of it should not be compensated on that footing. No doubt, it has been pointed out very fully by the Attorney General and by Mr. Horace Davey that her land alone might not or probably would not make a reservoir because it does not go all around the lake, and because parts of the land are scattered about. No doubt that is perfectly true, but then at the same time it contributes to it, it is absolutely essential to a reservoir and no reservoir could be made in those parts without taking her land any more than a reservoir could be made on her land without taking the land of other persons in the neighborhood. But when you come to consider the value of the land you have to take, you must assume that people will act in the usual way, and no doubt whenever any

reservoir is made at Thirlmere it would be made under Parliamentary powers which would be applied for by the persons who are desirous of making the reservoir, and that whether the water travels northward down to Keswick in that direction, or whether it travels southward in tunnels and on to Manchester, or wherever it was wanted to go—wherever it might be wanted to go, and under whatever circumstances Thirlmere might be turned into a reservoir it would be absolutely necessary that the Countess Ossalinski's land should be taken, and it seems to me it would be improper to deprive her of the benefit derived from that circumstance."

In that case the arbitrator, as Judge Stephen says, gave "a very large sum by way of compensation," on account of the value of the land as a part of a reservoir site.

CASES WHERE SPECIAL VALUES, INCLUDING RESERVOIR, WATER STORAGE AND OTHER PURPOSES, HAVE BEEN CONSIDERED:

- Alexain Bros. vs. Oshkosh, 95 Wis., 221.
- Alleghaney vs. Black, 99 Pa. State, 152.
- Alloway vs. Nashville, 88 Tenn., 510.
- Amoskeag Co. vs. Worcester, 60 N. H., 522.
- Atlanta Railway Co. vs. Post Telegraph Co., 120 Ga., 268, 281.
- Beckett vs. Midland R. R. Co., Law Reports, 3 C. P., 82.
- Boom Co. vs. Patterson, 98 U. S., 403.
- C., E. & L. S. Railroad Co. vs. Catholic Bishop, 119 Ill., 525.
- Chicago & Northwestern Ry. Co. vs. The Chicago & Eastern, etc., R. R. Co., 112 Ill., 589, 609.
- City of Syracuse vs. Stacey, 45 App. Div., 249, 254.

- College Point vs. Dennet, 5 N. Y. Sup. Ct., 5 T. & C., 217; 2 Hun, 669.
- Cobb vs. Boston, 112 Mass., 181.
- C. A. Cripps, Q. C., on The Law of Compensation, 4th Ed., published by Stevens & Sons, Ltd., in 1881, and brought down to 1900, p. 108.
- Cummings vs. The City of Williamsport, 84 Pa. State, 472.
- Currie vs. Waverly, etc., Ry. Co., 52 N. J. Law, 381.
- Denver Railroad Co. vs. Griffith, 17 Col., 598.
- Drury vs. Midland Railroad, 127 Mass., 571.
- Fales vs. Easthampton, 162 Mass., 422.
- Five Tracts of Land vs. The United States, 101 Fed., 661.
- Fosgate vs. Hudson, 178 Mass., 225.
- Frick Coke Co. vs. Painter, 198 Pa., 468, 485.
- Gage vs. Judson, 111 Fed. Rep., 358.
- Gardner vs. The Inhabitants of Brookline, 127 Mass., 358.
- Gearhart vs. The Clear Spring Water Co., 202 Pa. State, 292.
- Great Falls Mfg. Co. vs. U. S., 16 U. S. Ct. Claims, 160; affd., 112 U. S., 645.
- Harris vs. Schuylkill Railway Co., 141 Pa. State, 242.
- Harrison *et al.* vs. Young *et al.*, 9 Ga., 359.
- Harwood vs. Village of West Randolph, 64 Vt., 41.
- Hooker vs. M. & W. Railroad Co., 62 Vt., 47, 48, 49.
- Hyde Park vs. Washington Co., 117 Ill., 233.
- In re* Arbitration between Gough and the Aspasia Silloth and District Joint Water Board (Law Reports, K. B. Div., 1904, Vol. 1, p. 417).
- In re* Arbitration between the Mayor, etc., of Tynemouth and the Duke of Northumberland, 89 Law Times, 557 (1903).
- Johnson vs. Freeport, etc., Ry. Co., 111 Ill., 413, 419.

- Jonas vs. Noel, 93 Tenn., 440.
 Jones vs. Whitworth, 94 Tenn., 606.
 Laffin vs. Chicago, Western & Northern R. R.
 Co., 33 Fed., 415.
 Lake Shore & W. Ry. Co., vs. Chicago, etc.,
 R. R. Co., 100 Ill., 21, 23.
 Lawrence vs. Boston, 112 Mass., 181.
 Lewis on Eminent Domain, Sec., 479.
 Little Rock & Ft. Smith Ry. Co. vs. McGehee,
 41 Ark., 202.
 Little Rock Junction vs. Woodruff, 49 Ark.,
 381.
 Lolloy vs. Sterling, 31 Col., 102, 108.
 Low vs. Railroad, 63 N. H., 557.
 Manchester Corporation vs. Countess Ossalin-
 ski (decided in the Q. B. D. of the High
 Court on the 3rd and 4th of April, 1883,
 but not reported).
 Matter of Brookfield, 176 N. Y., 138; rever-
 sion, 78 App. Div., 520. See dissenting
 opinion of Judge Hirschberg in court below.
 Matter of Daly, 72 App. Div., 396.
 Matter of East River Gas Co., of Long Island
 City, 119 A. D., 350.
 Matter of Gilroy, 85 Hun, 424.
 Matter of N. Y., L. & W. Ry. Co., 27 Hun,
 116.
 Matter of The New York Central R. R. Co.,
 6 Hun, 149, 154.
 Maynard vs. Northampton, 157 Mass., 218.
 McKinney vs. Nashville, 102 Tenn., 131.
 Mississippi Bridge Co. vs. Ring, 58 Mo., 491.
 Montana Railway Co. vs. Warren, 6 Mont.,
 275.
 Moulton vs. Newberry Water Co., 137 Mass.,
 163.
 Muller vs. Ry. Co., 83 Cal., 245.
 O'Brien vs. Schenley Park and H. R. Co., 194
 Pa., 336.
 Orleans and J. R. Co. vs. Jefferson, etc., R. R.
 Co., 51 La. Ann., 1605.

- Payne vs. Kansas and Arkansas Valley Ry. Co., 46 Fed., 547.
- Rankin vs. Town of Harrisonburg, 52 S. E. Rep., 555.
- Reiber vs. Butler & Pittsburg Ry. Co., 201 Pa. St., 49.
- Riddell vs. Newcastle Water Co. (decided by the Court of Appeals on June 13th, 1879, but not reported).
- Russell vs. St. Paul, Minneapolis & Manitoba Ry. Co., 33 Minn., 210.
- San Diego Land and Town Co. vs. Neale, 78 Cal., 63.
- Sanitary District vs. Longhran, 160 Ill., 362.
- Sargent vs. The Town of Merrimac, 81 N. E. Rep., 970; decided by Supreme Court of Massachusetts, June 20th, 1907.
- Schuylkill Railway Co. vs. Stocker, 128 Pa. State, 233.
- Seattle and Montana Ry. Co. vs. Murphine, 4 Wash., 448, 456-457.
- Sedgwick on Damages, Vol. IV, Sec. 1179.
- Shenango and Allegheny Ry. Co. vs. Brahman, 79 Pa. State, 447.
- Snouffer vs. Railway Co., 105 Ia., 681.
- Spring Valley Water Works vs. Drinkhouse, 92 Cal., 528.
- St. L., J. & S. Railroad Co. vs. Kirby, 104 Ill., 345.
- Sweeney vs. Montana Central Ry. Co., 25 Mont., 543.
- Teele vs. Boston, 165 Mass., 88, 92, 93.
- Union Elevator Co. vs. Kansas City, etc., R. Co., 135 Mo., 353.
- Webster vs. Kansas City & Southern R. R. Co., 116 Mo., 114.
- Wilson vs. Equitable Gas Co., 152 Pa. State, 566.

OCT 12 1872

JAMES H. KENNEY

IN THE
Supreme Court of the United States

No. 15.

IN THE MATTER

OF

The Application and Petition of J. EDWARD SIMMONS, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the acts amendatory thereof, in the Towns of Olive and Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

JAMES P. McGOVERN,

Plaintiff-in-Error.

VS.

THE CITY OF NEW YORK,

Defendant-in-Error.

[In error to the Supreme Court of the State of New York.]

BRIEF FOR DEFENDANT-IN-ERROR.

ARCHIBALD R. WATSON,

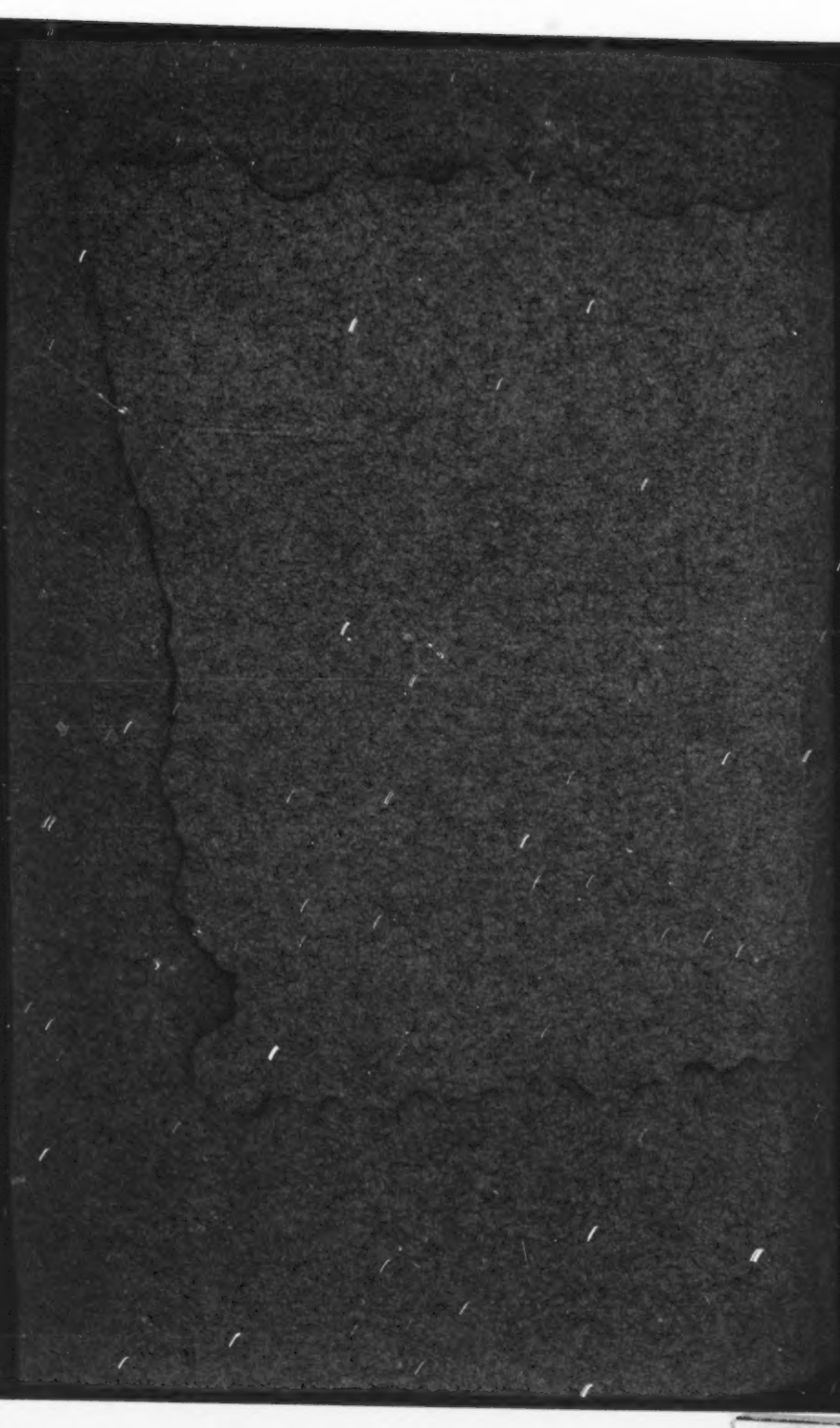
Corporation Counsel

Attorney for Defendant-in-Error.

WM. McM. SPENCER,

LOUIS C. WHITE,

Of Counsel.



INDEX.

	PAGE.
Statement	2

FIRST POINT.

No constitutional question is presented to this Court	4
---	---

SECOND POINT.

The New York Court decided correctly.....	7
---	---

THIRD POINT.

This Court will regard as conclusive the construction placed upon the State statute by the courts of the State of New York	21
--	----

FOURTH POINT.

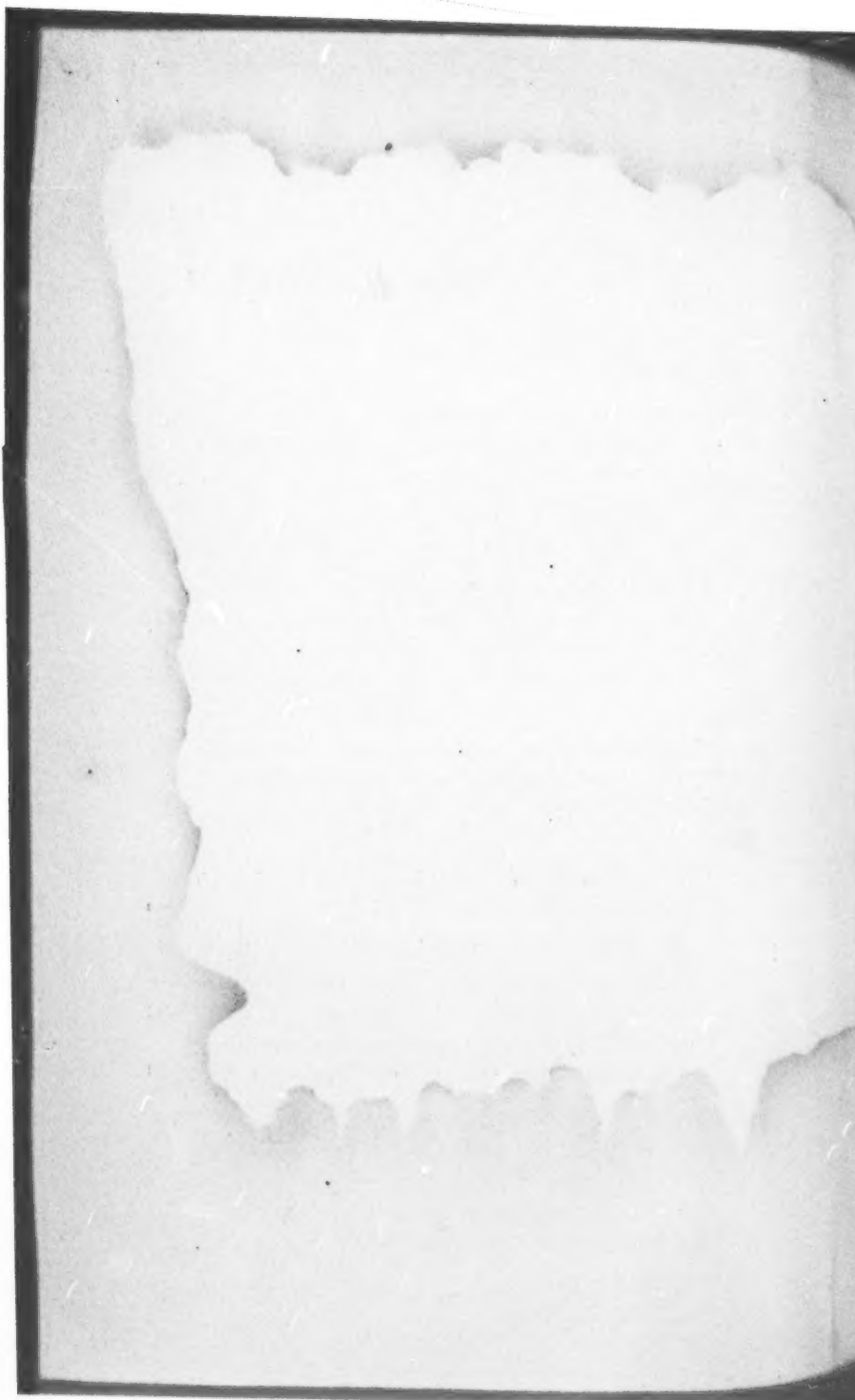
Plaintiff in error's specifications of error are without merit and present no question to this Court	22
--	----

LAST POINT.

The writ of error should be dismissed with costs	32
--	----

APPENDIX.

Opinion (130 N. Y., App. Div., 356)—re Parcel 271-A Section 7 Ashokan Reservoir....	33
Opinion (130 N. Y., App. Div., 350)—re Parcel 246—Section 6 Ashokan Reservoir....	39



Supreme Court,

OF THE UNITED STATES.

IN THE MATTER

OF

the Application and Petition of
J. EDWARD SIMMONS,
CHARLES N. CHADWICK
and CHARLES A. SHAW,
constituting the Board of
Water Supply of the City of
New York, to acquire real es-
tate for and on behalf of the
City of New York, under
Chapter 724 of the Laws of
1905, and the acts amendatory
thereof, in the Towns of Olive
and Hurley, Ulster County,
New York, for the purpose of
providing an additional supply
of pure and wholesome water
for the use of the City of New
York.

JAMES P. MCGOVERN,
Plaintiff in Error.

against

THE CITY OF NEW YORK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Error to the Court of Appeals of the State of
New York to review an order confirming an Award

made by Commissioners of Appraisal for property taken by the City of New York, under the provisions of Chapter 724, of the Laws of 1905, and the acts amendatory thereof.

Statement.

The defendant in error filed a petition in the Supreme Court of the State of New York for the appointment of three Commissioners of Appraisal to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate described in the petition of which the plaintiff in error was the owner of Parcel No. 246.

Article 1, Paragraph 7 of the Constitution of the State of New York provides:

“When private property shall be taken for any public use the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury or by not less than three commissioners appointed by a court of record as shall be prescribed by law * * *.”

Pursuant thereto under Chap. 724, Laws 1905, the New York Supreme Court appointed three commissioners before whom the case came on for hearing. A witness called by claimant, who appraised the property for agricultural purposes, valued the parcel taken and the damage to the residue at \$6,877.45 (fol. 42). Claimant also called two other witnesses, who testified that the quarries on the property were worth \$437 (fols. 108 & 111). Two witnesses of the City valued the property taken and the damage to the residue at \$2,800 (fols. 89 & 103). Two other experts on

behalf of the City testified that the quarries had no value (fols. 111-112). Testimony as to the structural value of the house and other buildings on the property was excluded by the Commissioners (fol. 65), as was also certain offers of testimony to prove claimant's property, in connection with the property of other owners, was available and adaptable for reservoir purposes (fols. 73-87). The Commissioners made an award of \$3,300. for the taking of the fee of the property, subject to the interest of the Homeseekers' Co-operative Savings & Loan Association, the owner of a mortgage of \$296.54, and, in addition, recommended that the sum of \$165. be allowed for counsel fees, and the sum of \$84. for expenses and disbursements, including reasonable compensation for witnesses. This award having been confirmed by the Special Term of the Supreme Court, an appeal was taken to the Appellate Division, Third Department, and was there affirmed in an opinion by Sewell, J. (130 App. Div., 350). An appeal was then taken to the Court of Appeals and the decision of the Appellate Division was affirmed without opinion (195 N. Y., 573). The opinions of the New York Court on this subject are annexed hereto.

Ten grounds of error are assigned, all of them being statements in different language of the same propositions, namely, that by the exclusion and refusal of the Commissioners to receive and consider evidence that the property in question was part of a natural reservoir site and could be so used in connection with the property of other persons, and, by the exclusion of testimony as to the structural value of the buildings and the refusal to allow costs before and after notice of trial, trial fee and certain disbursements, the

plaintiff in error was deprived of due process of law and the equal protection of the law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

POINT I.

No constitutional question is presented to this Court.

The award of \$3,300. for the property having been made after a full and fair trial in the courts of the State of New York, the plaintiff has not been deprived of any rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

Marchant vs. Penn. R. R., 153 U. S., 380;

Chgo., Bur. & Quincy R. R. vs. Chgo., 166 U. S., 226;

Backus vs. Fourth Street Union Depot Co., 169 U. S., 557;

Appleby vs. Buffalo, 221 U. S., 524.

In Marchant vs. Penn. R. R., *supra*, which was a proceeding against the Pennsylvania Railroad to recover damage occasioned by the erection of an elevated road on property belonging to the railroad and abutting on a street in front of plaintiff's property, the Court said at page 385:

"We are urged to sustain and exercise our jurisdiction in this case, because it is said that the plaintiff's property was taken 'without due process of law', and because the plaintiff was denied 'the equal protection of

the laws' and these propositions are said to present Federal questions arising under the Fourteenth Amendment of the Constitution of the United States, to which our jurisdiction extends.

It is sufficient for us in the present case to say that, even if the plaintiff be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law.'

The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition."

In *Backus vs. Fourth Street Union Depot Co.*, *supra*, the Court said:

"All that is essential is that in some prescribed way before some properly constituted tribunal inquiry should be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."

In *Chgo. Bur. & Quincy R. R. vs. Chgo.*, *supra*, where an award of \$1.00 was made for the opening of a street across railroad tracks, the Court said at page 246:

"We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

We say, 'in absolute disregard of the company's right to just compensation' because we do not wish to be understood as holding that every order or ruling of the State Court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect to such matters, that which is done or omitted to be done by the State Court may constitute only error in the administration of the law under which the proceedings were instituted. * * *

In harmony with those views, we may say in the present case that the State Court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation."

In *Appleby vs. Buffalo*, *supra*, the Court said at page 532:

"The only assignment of error which is here open for review does not show that the Court below, by any ruling of law, deprived the owner of the right of compensation for his property. The alleged denial of Federal right rests upon the assertion that the damages were nominal, while the property taken was of greater value. But, as this court has

heretofore held, if the State has provided adequate machinery for the ascertainment of compensation upon notice and hearing, and the record discloses no ruling of law which prevented compensation to the owner for the property taken, there is no lack of due process."

POINT II.

The New York Courts decided correctly.

If the alleged denial of due process of law in refusing to receive evidence presents a constitutional question which this Court will consider, it is submitted that the rulings of the Commissioners of Appraisal and the decisions of the courts of New York therein were correct and sound law.

The plaintiff in error here, who was the claimant in the State courts, called a witness and asked:

"Q. Was there a demand for an additional supply of water for the City of New York and has it existed for the last ten years of more?" (P. 45, Fol. 66-67.)

This question was objected to; objection was sustained; claimant excepted.

The claimant then offered to prove the height of the reservoir site, the cost of the dam, the storage capacity of the water shed, the reports of the engineers thereon, the cost to the City of New York of obtaining water from this source and elsewhere, the amount of water required by the inhabitants of the City of New York, the areas

and supplies of different water sheds and many similar alleged facts, including an offer to prove the intrinsic value of the reservoir site as a whole, its fair and reasonable market value as a whole and the profit that a private corporation could obtain if it had similar rights to the City of New York and could sell water to the people of the City of New York at a high enough price. The objection of the counsel for the City of New York was sustained. The claimant excepted and appealed to the Supreme Court of the State of New York and the Court of Appeals.

In the opinion, 130 App. Div. 350, annexed hereto, the justices of the Supreme Court of the State of New York held

“It is sufficient to say that the rule is well established in this State, by an unbroken line of authority, that the owner is to receive the full value of the land taken, not its value to the owner or to the person or corporation seeking to acquire it, but the market value of the property, which means the fair value as between one who wants to purchase and one who wants to sell. The land owner is not limited in compensation to the condition which the property is in at the time, or to the use which he makes of it, but is entitled to receive its market value for any purpose to which, in the judgment of the commissioners, it is adapted.”

Regarding the reservoir adaptability the learned justices held that it was not error to exclude the testimony offered to prove “that the Ashokan reservoir site is the cheapest, best and most available site for water supply purposes and for furnishing water to the City of New York;” that no issue was raised over it and that “the record shows

that the Commissioners understood that these facts were established."

It is respectfully submitted that this is sound law, not only in the Courts of the State of New York, but in the Courts of the United States. The City of New York having stated in its verified petition that this land was available and adaptable for reservoir purposes, there was no issue and it was a waste of time to take proof to that effect.

Another commission took the testimony offered by the same claimant's counsel on another parcel of land, and after taking it struck it out on the City's motion. That case was appealed by the same counsel who appears here for plaintiff in error and the opinion of the Supreme Court of the State of New York in that case is hereto annexed, in which it is said

"The just compensation which is guaranteed to the owner whose property is taken for public use is its fair market value at the time taken. It is true that he is not limited in compensation to the uses which he makes of his property, but is entitled to the fair market value for any use to which it is adapted by virtue of its location and for which it is available."

In this opinion the Court followed the well established law of the State of New York, citing from *Matter of Black River Railroad Co. v. Barnard*, 9 Hun, 104.

"It is the detriment to the owner for which he is to be compensated. When that has been ascertained he is not to be paid more because the land is peculiarly adapted to the use of the railroad."

The Court also writes

“To the same effect was the decision in *Matter of Boston H. F. & W. R. R. Co* (22 Hun 176) made by the General Term of this Department nearly thirty years ago, where Learned, P. J., said, ‘The situation of hills and stream often determines, as a matter of necessity, where a public road must be built. If it must go through some narrow pass, where the land is owned by one person, he must be made to give up his land for the public benefit. All that he can have is compensation. Now, if the railroad company are to pay what the price of land is worth “for railroad purposes,” and if the road must be built through that pass, then must pay any sum which the prospects of a successful railroad will warrant. For the land would be worth for “railroad purposes” any sum, however large, which would not actually prevent the building of the road. Such a rule would do away with nearly all the benefit of the compulsory power of eminent domain. It would be giving more than compensation.’ ”

In that case, Parcel 271, Sec. 7, claimant was permitted to put in the testimony which was excluded in the present case, Par. 246. After being received the testimony was stricken out on the ground that witness had assumed a total value for the whole reservoir site and apportioned that value among the several hundred parcels making up the reservoir site, and that this theory was erroneous. The testimony was properly stricken out.

It is respectfully submitted that this is sound law, and, if this Court regards these rulings and opinions of the State Courts of New York involve a constitutional question, that this Court should hold that the State Courts of New York decided rightly.

Just compensation to the owner whose property

has been taken for public purposes is to be measured by what the owner lost and not by what the taker has gained. Imaginary uses or speculative values are to be excluded.

Boston Chamber of Commerce vs.
City of Boston, 217 U. S., 189;
Monongahela Nav. Co. vs. United
States, 148 U. S. 312, at p. 343;
Chgo., Bur. & Quincy R. R. vs. Chgo.,
166 U. S., 226, at p. 250;
Bauman vs. Ross, 167 U. S., 548, at
p. 574;
Five Tracts of Land vs. United
States, 101 Fed. Rep., 661;
United States vs. Seufert Bros. Co.,
78 Fed. Rep., 520.

The plaintiff in error was the owner of one of more than a thousand parcels of land owned by as many different owners, involving the rights and interests of infants, tenants and lienors and covering numerous cemeteries, taken by the City of New York for the Ashokan reservoir. He claims as a matter of law under the constitution that he is entitled to have his property valued as a portion of the entire reservoir site. The decision of this Court in the case of *Boston Chamber of Commerce v. City of Boston*, 217 U. S. 189, would appear to be conclusive that the plaintiff in error is not entitled to any such right. That was a proceeding in the Massachusetts Courts to assess damages caused by the laying out of a street where the Chamber of Commerce owned the fee of the land taken, the Central Wharf & Wet Dock Corporation owned an easement of way, light and air over the land in question and the Boston Five Cent

Savings Bank held a mortgage on the land, subject to the easement. The three owners filed an agreement in the case that the damages might be assessed in a lump sum to which the City of Boston refused to assent. It was agreed that, if the owners were right, the damages should be assessed at \$60,000, but that, if the City was right, they should be \$5,000. The judge before whom the case was tried ruled in favor of the City of Boston and this ruling was sustained by the Supreme Court of Massachusetts (195 Mass. 338). The case was brought to this Court on a writ of error to the Supreme Court of the State of Massachusetts.

The plaintiff in error claimed that the market value of the "locus" of the land taken for the street at the time of the taking was \$60,000, and that under the authority of *Boom v. Patterson*, the owners in fee simple of the land unencumbered were entitled to recover that amount; that the right of the petitioners to recover the fair market value of the land was not lost because of the fact that there was more than one owner, nor by reason of the fact that the entire title was held by different owners, who owned different interests. This Court in its decision said,

"The Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unincumbered whole when it is not held as an unincumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as a matter of law

to have the damages estimated as if the land was the sole property of one owner."

It would seem to follow that, if the owners of one parcel are not entitled as a matter of law to have the property valued as a whole, the owner of one parcel is certainly not entitled to have his property valued in connection with hundreds of other parcels belonging to different owners.

The case of *Boom vs. Patterson*, 98 U. S., 403, relied upon by the plaintiff in error is not in conflict with the decision in the case of *Boston Chamber of Commerce vs. City of Boston*, nor is it an authority for the contention that the owner is entitled to have his property valued in combination with other property. The facts in the *Boom* case, as stated in the opinion of the Court, shows that the land was sought for the purpose of a boom for the accumulation and storage of logs; that *Patterson* owned one island in fee and parts of two others and all of the shore line, except three rods; that all that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the island farthest down the river with the west bank of the river, which could be readily done by booms or piers. So that in the *Boom* case the property in its then existing state could be used for boom purposes, not only by the owner but by others, and did not include its valuation in connection with the rights and property of others.

In the case now under consideration the property, as its number shows, was the 246th parcel taken and contained 60.459 acres, made up of hay, pasture and woodland (fol. 30), upon which there was a house and several out-buildings (fol. 36).

It is not pretended that this property by itself could be used by the plaintiffs, or any one else for a reservoir.

The plaintiff in error makes frequent reference in his brief to the Sage case, and after citing the decision of Judge Lacombe confirming the award made Mr. Sage by the Commissioners of Appraisal, Ashokan Reservoir, Section 15, for Parcel 733, says at page 32:

“In the Sage case the claimant proved all of the facts which Mr. McGovern, the plaintiff in error, offered to prove in this case now before this Court.”

The Sage case is now pending in the United States Circuit Court of Appeals for the Second Circuit, on a writ of error issued on the petition of the City of New York. It is sufficient here to say, as to the above statement of the plaintiff in error, that the City of New York denies that the testimony adduced in that case proves any of the “offers to prove in this case now before this Court” or that there is any proof in the Sage case that availability or adaptability for reservoir purposes enhanced the market value of any of the land taken for the Ashokan reservoir.

The testimony as to reservoir availability and adaptability in the Sage case is the same testimony that was received and then stricken out by the State Courts in Parcel 271, Section 7, one of the witnesses being the same Cornelius C. Vermeule of whose testimony the Appellate Division of the Supreme Court of the State of New York in its decision said:

“It therefore appears that the opinion of the witness as to the value of the premises in

question, was based upon its value in conjunction with the other parcels included in the reservoir site, upon the value of the reservoir, the feasibility and cost of conveying the water in pipes or an aqueduct to the City of New York, and the value of the water to the city.

It is to be noted that this evidence did not tend to prove the present market value of the property or its value at the time it was taken, but its probable value after other property is acquired, and millions of dollars are expended which may and may not be built. It was simply his opinion of the value based upon the necessity of the land to the city or what the city could afford to pay rather than do without it.

It is too clear for argument that such an estimate of value is in the highest degree uncertain and speculative. It is sustained by no authority, cited by the learned counsel for the appellant, and I think none can be found."

The City of New York, the defendant in error in this case and the plaintiff in error in the Sage case, understands the law to be as stated by the plaintiff in error in the case now before this Court at page 36 of his brief,

"Furthermore, it is unnecessary to cite authorities for the proposition that the value of real estate in the hands of an owner means the amount of money which the owner can obtain for the property in the open market."

The Sage parcel was purchased in the open market on May 17, 1909, for \$4,500, as will be seen by the stipuation at folio 1031 of the Sage tran-

script of record, which plaintiff in error says at the bottom of page 46 of his brief he will submit to the Court. Application for the appointment of Commissioners of Appraisal for Ashokan Reservoir, Section 15, in which section the Sage parcel was embraced, was made to the State Court on May 22, 1909, the six weeks' statutory notice by publication of such application having been given prior thereto, so that five days before the application for the appointment of Commissioners was heard and nearly six weeks after publication of the notice of the application, the Sage parcel was sold in the open market for \$4,500. In the face of this sale in the open market Sage offered opinion testimony similar to that rejected by the State Courts that the value of his parcel as a portion of the entire reservoir was something over \$58,000.

The McGovern case now before this Court is not like the case of Boom Co. v. Patterson, 98 U. S. 403, heretofore referred to. In that case the property owned by Patterson was located on the upper Mississippi River, where the sending of logs down the river is a regular business and where the property was presently and specially available and adaptable for boom purposes. Nor is it like the case where tenants in common own a lake which has peculiar value for purposes of water supply, a fact which is well known in the community and is likely to enhance the price which an intended purchaser would be willing to pay, which was the case in the Matter of Gilroy, 85 Hun, 424.

The difference between the facts in the case of Matter of Gilroy, where all the owners were tenants in common and owned the whole remaining lake, and the case now before this Court, where

there are a thousand wholly separate and distinct ownerships, is lucidly set forth in the opinion of Betts, J., 58 N. Y. Misc., 581, where at page 600 he says, referring to Matter of Gilroy.

“The land sought to be condemned by the City of New York was a portion of Lake Gilead in Putnam County, upon the west branch of the Croton river. The claimants were five women, tenants in common, the heirs at law, descendants and devisees of one, Adolph Philipse or his descendants, to whom said lake and other lands were conveyed by patent from King William 3rd. in 1697, and the property had been in the family ever since. The claimants owned 120 acres of the upper part of said Lake Gilead and the City of New York had acquired two acres and ten rods of the lower part of said lake, including its outlet. The 122 acres and ten rods comprised the entire lake. By Chapter 256 of the Laws of 1834, which was ‘An Act to provide for supplying the City of New York with pure and wholesome water,’ certain Commissioners were authorized to be appointed to be known as Water Commissioners of the City of New York, and they from time to time acquired portions of the Croton water shed. This act was further amended by Chapter 306 of the Laws of 1841, which provided for the completing of the Croton Aqueduct and a distributing reservoir at Murray Hill in the City of New York. From that time on down until the commencement of the proceedings to acquire the remainder of Lake Gilead in 1891 for half a century the City of New York had constructed the large Croton dam, which forms the Croton Lake on the Croton river about ten miles down stream from Lake Gilead and from time to time the City had purchased and leased various lakes and ponds and constructed dams and reservoirs thereon throughout the higher parts of Putnam and

Westchester Counties, so that some fifty years thereafter when this proceeding came to be started it became fairly well known that lakes and ponds of fresh water were desirable property to hold in that section above the Croton reservoir, as it was likely to be desired by the City of New York and a good price realized thereon and a market value for such property was created. The City of New York had also used for some time the water of this Lake Gilead so that at the time these proceedings were commenced, before and while they were pending this desire on the part of New York City for an addition to its water supply, it can easily be seen had affected the market value of properties of that kind. Reading the decision in the light of the questions before the Court we can see that what was shut out by these Commissioners was the market value of this property, a value which had grown up with the years and which had increased by the parties holding this lake for this long time. All the City of New York had to do upon acquiring that lake was simply to raise the gates and the water flowed in the natural stream down and into the large Croton reservoir, so that the conditions there were entirely different from what the conditions are here."

And at page 596 of the same opinion, referring to the land taken for the Ashokan Reservoir, of which this parcel formed a part,

"There will in the land taken by the Ashokan reservoir I am informed about one thousand parcels of land. Many of these parcels have more than one owner, one before me has eight tenants in common. Many others of them have lienors, tenants and different interests connected with them, which must be acquired by any person desiring to create a reservoir there. There are easily an average"

of two persons interested in each of these parcels of land. In order to make this parcel eighty-five available as a reservoir the consent of these other owners or persons interested must be obtained. Many of these owners are persons under age or otherwise incompetent and from the nature of things could not consent, nor would any one be authorized to consent for them with the owner of parcel No. 85 that this whole section should be made into an immense reservoir. The tract—the whole proposed reservoir site—contains numerous cemeteries in which deceased persons have been interred. Such properties are inalienable and no one could give consent to their forming part of a reservoir site. In addition there are many school-houses and churches, the owners and congregations of which it is reasonable to assume would embrace people residing outside of the reservoir district whose consent would have to be obtained to the use of this property for a reservoir site and in some instances legislation would be necessary. There are miles of public highways in this section which requires statutory authority to close for the purpose of a reservoir site and to close which would require the consent of many people outside of the reservoir district. Recollecting that there is no water upon this parcel of land which is available for filling such a reservoir as is contemplated in the offer here recourse must be had to the Esopus Creek which runs through this immense proposed reservoir site containing some 8,000 acres and from which stream and its tributaries the water for filling this dam is expected to be obtained, so even after having obtained the consent of the riparian owners along this Esopus Creek in the proposed reservoir section for the construction of this reservoir there is still no water available to fill it. 'Running water in natural streams is not property and never

was.' City of Syracuse vs. Stacey, 169 N. Y., 231-245. Hence these riparian owners do not own the water in the Esopus. The Esopus Creek empties into the Hudson River some twenty-five or thirty miles below where the City of New York proposes to erect its dam or where if a combination of the owners of land was affected their dam would be erected. Each of the riparian owners on each side of that twenty-five or thirty miles of stream has a right to the use of this water in the way in which it is now running and always has run. So the consent of all of these riparian owners would be necessary to construct a similar dam or any kind of a dam which would impound the large body of water which is proposed to be impounded here. Easily one thousand people and probably many more would be interested in that proposition. If their consent was obtained and the dam constructed and the water impounded still so large a body of water is not successfully marketable by the glass, pail or car-load. There is only one market for it and that is the City of New York, some ninety odd miles distant. Assume that the consent of all those parties owning lands through which the proposed aqueduct is to run could be obtained to the construction of an aqueduct similar in its nature to the one that is proposed to be constructed by the City of New York, another army of people must be consulted with probably other infants and incompetents who cannot consent, so that many hundreds of people more would be required to give their consent to this proposed dam as about two hundred parcels are in the Ulster County division of the Aqueduct. The offer on the part of Elizabeth Hogan does not contain any statement that she is able, ready and willing to furnish the millions of dollars required to erect this dam and aqueduct, pay these riparian owners and carry this water to New York so that

something more than consent is necessary. For these reasons among others it seems to me that the attempt to show that this great proposed reservoir and aqueduct could have been constructed by any possible combination open to the residents and land-owners there before the condemnation by any suggested method that has come to my attention seems entirely the product of a fertile imagination, or that (which is the true test) such a proposed combination and construction or the right to combine and construct could have added in any way to the market value of a farm, wood lot, residence or building lot in Section No. 3, is altogether unlikely. It seems fanciful and speculative in the extreme. Nothing approaching it has been called to my attention."

POINT III.

This Court will regard as conclusive the construction placed upon the State statute by the courts of the State of New York.

This has been so frequently and uniformly held by this Court that a reference to cases would seem to be unnecessary.

Boston Chamber of Commerce vs.
City of Boston, 217 U. S., 189;
Maiorano vs. Balto. & Ohio R. R.,
213 U. S., 268;
Backus vs. Fourth Street Union
Depot Co., 169 U. S., 557;
Burgess vs. Seligman, 107 U. S., 20.

In *Backus vs. Fourth Street Union Depot Co.*, *supra*, one of the leading cases on this point, the Court said:

“The settled rule of this court in cases for the determination of the amount of damages to be paid for private property condemned and taken for public use is that it accepts the construction placed by the Supreme Court of the State upon its own constitution and statutes.”

POINT IV.

Plaintiff in error's specifications of error are without merit and present no question to this Court.

In his brief, plaintiff in error omits several specifications contained in the printed record, such as that his witness fees were not properly taxed and other matters which he tacitly admits are of no concern here. The seven points contained in his brief narrow down practically to three, the first point being repeated in several ways.

1st—That the rulings of the Commissioners of Appraisal and the Courts of the State of New York on offers to prove contained on pages 10-22 of plaintiff in error's brief, and found in printed record, pages 45, 50 to 57, confiscated claimant's property and were in violation of the fifth and fourteenth amendments of the Constitution of the United States.

2nd—That the market value is not in this case

the true measure of just compensation (plaintiff in error's brief, pages 99-102).

3rd—That in certain other cases, especially in certain English cases, reservoir adaptability has been taken into consideration.

These three points are all addressed to the rulings of the Commissioners of Appraisal and the opinions of the Supreme Court of the State of New York. Plaintiff in error's brief, page 70, asserts regarding these,

“The reasoning by which the Appellate Division of the Supreme Court of New York State reached its conclusion, which was affirmed without opinion by the State Court of Appeals, so far as it is clear and to be understood, is unsound in principle and necessarily leads to a false result and to the confiscation of the property of plaintiff in error.”

No question is raised by the plaintiff in error but that the Constitution of the State of New York is in accord with the Constitution of the United States. It is admitted that this special proceeding for the acquirement of this parcel among several hundred others for the Ashokan Reservoir was duly instituted, that the laws of the State of New York thereon are in accord with the Constitution of the United States and of the State of New York and that the plaintiff in error had due notice thereof and “made no defense or opposition.” (Page 3, Brief.)

The Commissioners of Appraisal were duly appointed and had jurisdiction. The plaintiff in error was heard by said Commissioners, appeared before them and produced witnesses. The award was confirmed and on the appeal as taken by the plaintiff in error herein therefrom he had a

hearing both before the Supreme Court and the Court of Appeals and both these courts decided against him.

The plaintiff in error's sole objection, and the only point really raised in his brief, is that the Commissioners of Appraisal and the Courts of the State of New York erred in their rulings on certain offers of proof and that instead of sustaining the City of New York's objections to this testimony and giving the plaintiff in error an exception, the Commissioners of Appraisal should have taken the testimony.

Surely, this is not a constitutional question. There is no denial of due process of law. On the contrary, plaintiff in error admits that all the provisions of law were complied with and his papers show that he had a full hearing before the Commissioners of Appraisal, before a Justice at Special Term, before the Appellate Division and before the Court of Appeals. There can be no question about the due process of law. Neither can there be any question about the equal application of the law because the plaintiff in error had the same hearings before the same tribunals as other claimants and the decisions of these State Courts were the same.

Narrowed down to its real substance plaintiff in error's real claim is that he should have been paid more for his property than the Commissioners of Appraisal awarded. The plaintiff in error's second point practically admits that the Commissioners of Appraisal awarded the market value of the property. He, however, claims that the "market value is not always the true measure of just compensation" and that he should be paid more by reason of the fact alleged by him that it was

cheaper for the City of New York to take this particular site for a reservoir than some other site and that he should therefore receive an additional sum.

Surely, this Court will not undertake to sit as a Court of Appeals on rulings on questions of evidence and pleading made by the State courts. Whether or not the State courts should have received the evidence which the plaintiff in error offered is not a question of due process of law or of just compensation, but of the rules of evidence and pleading. And if this Court will take jurisdiction of this case on the ground that these rulings resulted in claimant receiving less than what he thought was just compensation, any other proceeding or action might similarly be brought to this Court and this Court asked to review the rulings of the State courts on questions of evidence on the ground that their rulings resulted in a smaller judgment than "just compensation."

Suppose that the rulings of the Commissioners and the State courts had been in favor of the plaintiff in error and against the City of New York, could the City of New York come here and ask this Court to set aside the decision of the highest court of the State of New York on the ground that by these rulings on questions of evidence the City of New York had been deprived of its property without due process of law in that it was compelled to pay to the claimant a sum in excess of just compensation?

Before this Court the rights of the City of New are the same as the rights of the plaintiff in error. If the plaintiff in error has the right to come here to review rulings on evidence before the State

courts because, as he claims, they resulted in giving him too little, the City of New York would have the equal right to review rulings against it on the ground that they gave the claimant too much. *This would, in effect, take away from the highest court in the State of New York, its title, the Court of Appeals, and make this Court a universal Court of Appeals for all cases involving property rights and compensation therefor in all the State courts of the United States.*

But did the State courts err in their rulings on questions of evidence?

The plaintiff in error asked this question of the witness:

“Q. Was there a demand for an additional supply of water existing on the part of the City of New York, and has it existed for the last ten years or more?”

This was objected to on several grounds, among them that

“It appears from the record upon which the Commission was appointed and which is a part of the record before the Court, that there was such a demand, and that the officers charged with the duty of procuring a supply of pure and wholesome water, after due investigation and examination, selected the reservoir site in question as being the site of a reservoir for the purpose of supplying such pure and wholesome water to the City of New York, wherefore such a demand and such adaptability is conclusively presumed in this proceeding and is not a subject of testimony which can neither add to nor subtract from such presumption.”

This objection was sustained. The fact that

the City of New York was taking this land for a reservoir was conclusive against the City and any testimony on that subject was as superfluous as would be proof of the signature in an action on a promissory note, where the answer specifically admitted the execution and delivery.

In the opinion of the Appellate Division annexed hereto, 130 App. Div. 350, the objection was sustained on the same ground that the Commissioners sustained it, the Appellate Court writing,

"It was not error to exclude the testimony offered, as those facts were stated in the petition and no issue was raised over the question of a demand on the part of the City of New York or the availability or adaptability of the property. When the material allegations in a verified petition are not denied they stand sufficiently proved for the purpose of the ultimate order. (99 N. Y. 12.)

The proceeding was based upon a demand for the property upon the part of the City of New York and its adaptability and availability in conjunction with other parcels for a reservoir site."

Plaintiff in error's brief seeks to interject into this case the Sage case, a proceeding in the Federal Court where evidence was received that the State Courts had rejected.

In the Sage case the City of New York made no objection to this testimony being taken, which had been offered and refused in the present case. Except on its own motion the Commission could not have excluded it because no objection or motion to strike out was made. The Sage case is therefore not an authority on this question of evidence, because the question was not raised or presented in the Sage case.

It is quite possible for different Commissioners of Appraisal to place different values on similar property. Indeed, it is rare that two juries or two commissions give identically the same awards in dollars. The fact that the Commission in the Sage case made a higher award per acre than did the Commission in this case is no proof of anything except the lack of uniformity in human judgment and opinion as to values.

And the attention of the Court is further called to the fact that the claimant in the Sage case, who has a common interest with the plaintiff in error here and is represented by the same counsel as the plaintiff in error here, opposed in toto the award in the Sage case and that the decision of the learned judge at the Circuit Court denied Mr. Sage's motion "to send back on the ground that the amount awarded for reservoir adaptability is wholly inadequate." In the Sage case the City permitted the claimant to put in any testimony that he pleased, without objection or exception or motion to strike out, notwithstanding which the claimant moved at Circuit Court for a retrial on the ground that the award was "wholly inadequate." That is, the claimant seems to be unable to secure what he calls "just compensation," either in the State Courts or in the United States Circuit Court.

Plaintiff in error seeks to read into this case testimony in the Sage case to the effect (brief, page 46) "that the use of this property will result in great profits to the City will be conclusively seen by a casual reference to the facts proven in the Sage case."

These facts are that if the City of New York

gets 500,000,000 gallons of water a day and none of it leaks, or is wasted, which it does not; and if all of it is metered, which it is not; and if all of it is sold at \$133 per million gallons, which it is not; and if it cost nothing to distribute it or maintain the water system, and no allowance is made for interest during the cost of construction, the City of New York will make money. If the water rates were lower, the City would lose money. If the water rates were higher the City would make more money. The plaintiff in error's grievance is that he was not allowed to show in this case what he was allowed to show in the Sage case.

It is a legal novelty that the condemnation value of the lands taken for reservoir purposes depends on the water rates which the City of New York charges and that the owner of a farm in the Catskills should receive more or less money for his property according to whether the Water Department of the City of New York raises or lowers water rates or charges by the meter or the frontage.

The plaintiff in error's brief lays great stress on the case of *Boom Co. v. Patterson* and the matter of *Gilroy*, 85 Hun. Referring to page 50 of plaintiff in error's brief, Chief Judge Cullen, in the matter of *Gilroy*, cited with approval the *Boom Co.* case. Chief Judge Cullen at that time was on the Appellate Division. At the time of the decision of the present case he was Chief Judge of the Court of Appeals. The plaintiff in error is now appealing from the decision of the very Chief Judge who cited with approval the *Boom Co.* case. That, is, this Court is asked now to hold, first, that Chief Judge Cullen has decided the same question of law in a diametrically opposite way and, sec-

ond, that he was right in the Gilroy case and that he is wrong in the McGovern case.

It is respectfully submitted that this Court does not sit to decide whether judges of State courts do or do not make conflicting rulings and decisions. Neither is it the province of this Court, assuming that the rulings of the State and English Courts are conflicting, to attempt to reconcile them. It may be repeated here that there is no conflict between Boom Co., the Gilroy case and this case. In the Boom Co. case there was only one owner. In the Gilroy case the five owners were tenants in common. Here there are a thousand distinct owners.

In attempting to get away from the fact that no constitutional question is involved in this case, plaintiff in error's brief goes far afield. On pages 58 and 59 he states that the United States paid ten million dollars for the Panama Canal strip, "the equivalent of between \$50 and \$55 per acre, for wild, unimproved, vacant land in a barren country, without population, never cultivated by man, for practically valueless land in the tropics, which it must be conceded by all would not bring 50 cents to \$1 gold per acre in open market."

Counsel for the defendant in error was under the impression that the party to whom the United States paid ten million dollars was the Republic of Panama, and that payment was not made in a condemnation proceeding under the right of eminent domain, but to acquire civil and criminal jurisdiction. As the plaintiff seeks to import evidence in the Sage case into this appeal, so he seeks seemingly to argue that because the "United States (brief, page 59) allowed them 50 to 100 times its marketless agricultural value" in Pan-

ama, therefore the City of New York should pay 50 or 100 times the value of the Sage or McGovern farm.

Again, on page 95 of the plaintiff in error's brief, the argument is made that it would have cost more money had the City of New York built an aqueduct in the Adirondacks, 188 miles long, than to the Catskills 86 miles long, and that therefore the City of New York should pay more for this farm.

Until reading plaintiff in error's exhaustive and voluminous brief, counsel for defendant in error had been of the opinion that the condemnor should pay the market value for property taken and that whatever that value was, was a question of fact to be determined by the Commissioners and the State Courts in the manner provided by Paragraph 7, Art. 1 of the Constitution of the State of New York. There is no question raised but that all the proceedings required by the State Constitution and the State law were had and that the Commissioners of Appraisal reported what, in their judgment, was "just compensation," and that that report was confirmed by all the State courts.

The proposition that the City of New York should pay "intrinsic value" and not market value is novel. How "intrinsic value" is to be determined in dollars and cents counsel humbly confesses his ignorance. As to any legal authority holding that intrinsic value and not market value is the measure of "just compensation," there is a lack of authority and this Court is asked to create one.

It is respectfully submitted that were this Court

to do what plaintiff in error asks, it would result in an upheaval of the present principles of condemnation law.

POINT V.

The writ of error should be dismissed with costs.

Respectfully submitted,

ARCHIBALD R. WATSON,
Corporation Counsel.

WILLIAM McM. SPEER,
LOUIS C. WHITE,
of Counsel.

APPENDIX.

130 App. Div., 356.
Aff'd 195 N. Y., 573.

Supreme Court,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

of

THE APPLICATION AND PETITION OF
J. EDWARD SIMMONS, CHARLES
N. CHADWICK AND CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real es-
tate for and on behalf of the
City of New York.

CONDEMNATION PROCEEDINGS. EVIDENCE OF AVAILABILITY OR ADAPTABILITY.

An estimate of the value of premises taken by condemnation proceedings for use as part of a reservoir based on its value in conjunction with the other parcels in the reservoir site, the value of the reservoir, the feasibility and cost of conveying the water to New York and the value of the water to the city is in the highest degree uncertain and speculative; and it is not error for commissioners of appraisal to strike out such testimony.

The question is not whether the property is peculiarly adapted to a special use but whether purchasers can be found who would pay more because of its adaptability.

It is only where it is shown that the chances or probability of a sale for some special use has affected the price which the property would bring in the market that its availability or adaptability can be considered in determining the market value.

Argued November Term 1908.

Decided January Term 1909.

Appeal from a final order of the Supreme Court confirming a report of the commissioners of appraisal as to Parcel 271-A in Section 7 of the Ashokan Reservoir, filed in the Clerk's Office of the County of Ulster, February 15, 1908.

Before

SMITH, Presiding Justice.

CHESTER, KELLOGG, COCHRANE, SEWELL,
Associate Justices.

D. CADY HERRICK for appellant.

JOHN J. LINSON for respondent.

SEWELL, J.

The commissioners awarded \$3,800 as the compensation which ought justly to be made by the City of New York to the appellant. The real estate for which the award was made consists of 60.6 acres and is one of several hundred parcels taken by the city for the reservoir. The chief question presented by this appeal is whether the commis-

sioners erred in striking out the evidence of Cornelius C. Vermeule, a civil engineer, as to the value of the property in question, the intrinsic value of the reservoir and the value of the water to be em-pounded by it. The witness testified that the fair and reasonable market value of this parcel on the 22nd day of July, 1907, when it was taken by the city, was \$99,280 and that in arriving at this estimate he considered the special adaptability of the reservoir site, of which the parcel is a part, and the special availability of it as compared with other possible sites, and secondly the reasonable value of water delivered to a city for city use and the cost of delivery.

He also testified that the Ashokan Reservoir site was worth \$34,000,000.00 and that this valuation was based upon the capacity of the reservoir, the reasonable market price of the water when delivered at the furthest city in which it would be likely to be used and the cost of delivery; that the storage capacity of the property in question would be 76-100 of one per cent of the whole capacity of the reservoir; that on that basis the intrinsic value of the property taken would be \$248,000 and the market value was 40 per cent of that sum or \$99,280.00.

It therefore appears that the opinion of the witness as to the value of the premises in question, was based upon its value in conjunction with the other parcels included in the reservoir site, upon the value of the reservoir, the feasibility and cost of conveying the water in pipes or an aqueduct to the City of New York, and the value of the water to the city.

It is to be noted that this evidence did not tend to prove the present market value of the property

or its value at the time it was taken, but its probable value after other property is acquired, and millions of dollars are expended in the construction of a reservoir, which may and may not be built. It was simply his opinion of the value based upon the necessity of the land to the city or what the city could afford to pay rather than do without it.

It is too clear for argument that such an estimate of value is in the highest degree uncertain and speculative. It is sustained by no authority, cited by the learned counsel for the appellant, and I think none can be found. On the contrary it was held in *Matter of Black River M. R. R. Co. v. Barnard* (9 Hun, 104) when the land sought to be taken was peculiarly adapted for railroad purposes that, "It is the detriment to the owner for which he is to be compensated. When that has been ascertained, he is not to be paid more, because the land is peculiarly adapted to the use of the railroad." To the same effect was the decision in *Matter of Boston H. F. & W. R. R. Co.* (22 Hun, 176) made by the General Term of this Department nearly thirty years ago where Learned P. J., said, "The situation of hills and streams often determines, as a matter of necessity, where a public road must be built. If it must go through some narrow pass, where the land is owned by one person, he must be made to give up his land for the public benefit. All that he can have is compensation. Now, if the railroad company are to pay what the price of land is worth "for railroad purposes," and if the road must be built through that pass, then they must pay any sum which the prospects of a successful railroad will warrant. For the land would be worth "for railroad pur-

poses" any sum, however large, which would not actually prevent the building of the road. Such a rule would do away with nearly all the benefit of the compulsory power of eminent domain. It would be giving more than compensation."

The just compensation which is guaranteed to the owner whose property is taken for public use, is its fair market value at the time taken. (*Matter of Daly*, 72 App. Div., 394; *Matter East Riv. Gas Co.*, 119 App. Div., 350; *Village of St. Johnsville v. Smith*, 184 N. Y., 341; *Moulton v. Newburyport Water Co.*, 137 Mass., 163). It is true that he is not limited in compensation to the use which he makes of his property, but is entitled to a fair market value, for any use to which it is adapted by virtue of its location and for which it is available.

In determining the question of value it is proper to show the condition of the property and its surroundings the uses to which it has been applied, and its capacities for other uses, including that for which it is required, and then the witness can give an estimate of its value, in consideration of all the uses and elements of value; but he cannot give an opinion of its value for any special use. The value of property is not limited by the present use or the use for which it is sought, as either may be more or less, than its market value. For example land may be valuable, abstractedly considered, for reservoir purposes, but its market value would depend upon a demand for such a purpose. If no one desired the property for a reservoir its value might be much less than for any other purpose. The question, therefore, is not whether the property is peculiarly adapted for the special use, but whether purchasers can be found who would pay

more for it because of its adaptability to the use. It is only when it is shown that the chances or probability of a sale for some special use has effected the price which the property would bring in market that its availability or adaptability can be considered in determining the market value. (Matter of N. Y. L. & W. R. R. Co. v. Arnot, 27 Hun, 151; Daly v. Smith, 18 App. Div., 197).

No evidence was given in the present case tending to show that before the land was taken by the city it was regarded as more valuable because of its advantage of location and adaptability for use as a reservoir. It is substantially undisputed that the value "for reservoir purposes" is entirely due to the fact that the city has determined to build the reservoirs, and that the owner is now seeking to make the necessity of the city his opportunity.

Without further discussion I think it is sufficiently clear that the commission did not err in striking out the evidence.

The order appealed from should therefore be affirmed with costs.

130 App. Div., 350.
Aff'd 195 N. Y., 573.

Supreme Court,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

of

THE APPLICATION AND PETITION OF
J. EDWARD SIMMONS, CHARLES
N. CHADWICK AND CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real es-
tate.

CONDEMNATION PROCEEDINGS. AVAIL-
ABILITY OR ADAPTABILITY. STRUC-
TURAL VALUE. COSTS.

The owner of land taken for a public use is entitled to the full market value of the property, which means the fair value as between a willing seller and a willing purchaser. He is not entitled to be paid more merely because the land is peculiarly adapted to the use to which it is to be applied.

It is only where it appears that the market value of the property is enhanced in the public mind by the chances or probability that sometime in the future it may be required for the purpose to which

it is adapted that such adaptability may be taken into account by commissioners of appraisal.

The structural value of buildings upon the property taken is not competent evidence in condemnation proceedings.

In proceedings under Chapter 724 of the Laws of 1905, the property owners are not entitled to taxable costs. An allowance for counsel fees of five per cent on the amount of the award, *held* sufficient under the circumstances of this case.

Argued November Term 1908.

Decided January Term 1909.

Appeal from a final order of the Supreme Court, confirming a report of the commissioners of appraisal for Section 6 in the Ashokan Reservoir, filed and entered in the Clerk's Office of the County of Ulster, April 17, 1908, and from the appraisal and report of the commissioners.

Before

SMITH, Presiding Justice.

CHESTER, KELLOGG, COCHRANE, SEWELL,
Associate Justices.

D. CADY HERRICK for appellant.

JOHN J. LINSON for respondent.

SEWELL, J.

This proceeding was instituted under Chapter 724 of the Laws of 1905, entitled "An act to provide for an additional supply of pure and wholesome water for the City of New York; and for the acquisition of lands or interest therein and for the construction of the necessary reservoirs, dams,

aqueducts, filters and other appurtenances for that purpose; and for the appointment of a commission with the power and duties necessary and proper to attain these objects."

Section 12, of the act provides for the appointment of commissioners of appraisal and that it shall be their duty to view the real estate and hear the proofs and allegations of the parties and other persons interested and that they "shall without unnecessary delay, ascertain and determine the just and equitable compensation which ought to be made by the City of New York to the owners or the persons interested in the real estate sought to be acquired or affected by said proceedings."

The proceedings were commenced June 25, 1907, to acquire certain real estate in the Town of Hurley, Ulster County, known as Parcel 246. The commissioners of appraisal were appointed June 29, 1907, and on the 6th day of November, 1907, they proceeded to hear the proofs and allegations of the parties. In their report dated January 3, 1908, they stated that they had estimated and determined upon \$3,300.00 as the sum to be paid to the owners for the fee of the premises.

The principal question presented by this appeal is whether the commissioners proceeded upon an erroneous principle in determining the amount that should be awarded to the owners. It is unnecessary to cite and comment upon the various cases, decided in the courts of this and other states, upon the subject of damages in proceedings of this character. It is sufficient to say that the rule is well established in this state, by an unbroken line of authority, that the owner is to receive the full value of the land taken, not its value to the owner or to the person or corporation seek-

ing to acquire it, but the market value of the property, which means the fair value as between one who wants to purchase and one who wants to sell. The landowner is not limited in compensation to the condition which the property is in at the time, or to the use which he makes of it, but is entitled to receive its market value for any purpose to which, in the judgment of the commissioners, it is adapted. He is, however, not entitled to be paid more merely because the land is peculiarly adapted to the use to which it is intended to be applied. The fact that the land will be used for a reservoir rather than a farm or any other lawful business, forms no material out of which an award is to be made. Whether the land taken is to be used for a reservoir, or a garden, is a question, so far as the compensation is concerned, with which the commissioners have nothing to do. Their duty is to award compensation for the taking of the land and not for the use to which it will be applied when taken. (The Albany Northern R. R. Co., 16 Barb., 68; Matter of Daly, 72 App. Div., 394; Matter of East River Gas Co., 119 App. Div., 350).

It is only when it is shown that it has a market value for some particular use, that the availability and adaptability of the property to the use, can be taken into account by the commissioners in determining its fair market value.

The owner is not entitled to swell the damages, beyond the fair market value of the land at the time it is taken, by any consideration of the chances or probability that sometime in the future, it may be used for some purpose to which it is adapted, unless it appears that the market value of the property is enhanced by the chances or prob-

ability. As was stated in *Moulton v. Newburyport Water Co.* (137 Mass., 163): "If there were different customers who were ready to give more for the land on account of the chances, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness in forming an opinion of the market value." But the mere hopes of an owner that his property may at some future time be required for a reservoir or storage basin for supplying the City of New York or any other city with water, cannot be considered; unless the probability of such an event, in the public mind, had in fact affected the fair market value at the time it was taken. (*Matter of N. Y., L. & W. R. R. Co. v. Arnot*, 27 Hun, 151). This rule was stated by Mr. Justice Cullen in the *Matters of Daly v. Smith* (18 App. Div., 197) where he said: "It is the market value of the property that is the measure of the compensation. When, therefore, it is sought to show that a tract of land has a use for a particular purpose, it must be also shown that it is marketable for that purpose, or has an intrinsic value."

It is contended on behalf of the appellant that an improper basis was adopted by the commissioners in determining the compensation which ought justly to have been made him. (1) In excluding from consideration as an element in the market value of the property, the structural value of the buildings upon it. (2) In excluding evidence of the adaptability and availability of the property for reservoir purposes. (3) In excluding evidence of the value of the property as a part of a reservoir site. It is argued that the award

is much less than it would have been had this evidence been admitted and considered. It is unnecessary to discuss the question whether the commissioners erred in refusing to permit the owner to show the value of the structures upon the land, further than to say, that it is the market value of the land with the buildings and other improvements thereon, that it is the measure of compensation. The buildings put upon the land are simply adjuncts to the freehold. They add to its value and are properly included in an appraisal of it but it is the value of the land and structures which is to be determined, and not the cost of them. For these reasons it has been held that testimony of the structural value of buildings is not competent in proceedings of this kind. (Matter of the City of New York, 118 App. Div., 272; Village of S Johnsville v. Smith, 184 N. Y., 34).

It is probably true that the commissioners might properly have received evidence tending to show that the Ashokan reservoir site is the cheapest, best and most available site for water supply purposes and for furnishing water to the City of New York, but it was not error to exclude the testimony offered as those facts were stated in the petition, and no issue was raised over the question of a demand on the part of the City of New York or the availability or adaptability of the property. When the material allegations in a verified petition in a special proceeding are not denied by some counter affidavit they stand sufficiently proved for the purpose of the ultimate order. (26 St. R., 968; 99 N. Y., 12.)

The proceeding was based upon a demand for the property on the part of the City of New York and its adaptability and availability in conjunction

with other parcels for a reservoir site. The record shows that the commissioners understood that these facts were established, and that they went no farther than to hold that the facts could not be considered, in forming an opinion of the market value of the property, in the absence of any evidence showing that they had enhanced or affected its value, before it was appropriated by the City.

It was for the commissioners to determine whether the land was really saleable and marketable as a part of a reservoir site, and if they so found, the real price or sum that could be obtained for it. The appellant did not prove or attempt to prove that the value of the property in question or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes before the commencement of this proceeding. There is no shadow of evidence of any prior demand for the property as a reservoir site or of any customer who will give more for it for that purpose, or of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined. In the absence of such evidence it is plain that the appellant has received the benefit of everything which enhanced the value of his property, except the increase caused by the taking of it by the City. The offer was in effect, to prove an increase in value due to the selection of the site by the City and the proceeding to acquire it. It did not merely bring up the question of the value of the property taken from the appellant, but that value plus an increase in value caused by the proceeding to condemn. As I have

already observed, the question was the market value of the property unaffected by the determination to use it for a reservoir site, and to this question the commissioners rightly confined the evidence.

As to the authority of the Court to allow costs under Section 3240 of the Code of Civil Procedure, I agree with the opinion of Mr. Justice Mills in *Matter of the Board of Water Supply of the City of New York*, which was another proceeding under this statute, that a claimant is not entitled to costs at the rate allowed for similar services in an action. Section 13 of the statute in question provided for an allowance to parties appearing in the proceeding, of such sums as the commissioners may deem proper to be allowed, "as expenses and disbursements, including reasonable compensation for witnesses." My opinion is that the legislature intended by this provision to regulate the question of costs in proceeding under the statute. Laws are presumed to be formed with deliberation and with full knowledge of all existing ones on the same subject (*Brown v. Lease*, 5 Hill, 221). So it is but reasonable to conclude that the legislature in passing this statute did not intend that the right to costs under it, should be governed by the general statute as to costs in special proceedings. This case is to be distinguished from, *Matter of the Application of the City of New York to Acquire certain Real Estate in the Town of Hempstead*. (125 App. Div., 219), relied upon by the appellant. Chapter 725 of the Laws of 1905, under which that proceeding was brought contains no provision for the allowance of costs, expenses or disbursements to the claimant. "It does not," said Mr. Justice Woodward in that case, "assume to be an act to

govern the proceedings in condemnation in whole,
* * * * it relates to the matter of proceedings
under other statutes, whether general or special,
and being a statute in *pari materia*, is to be read
and construed in connection with these other
statutes, rather than superseding them."

Chapter 724 is a special statute. It pretends to cover the whole question of condemnation proceedings by the City of New York to acquire lands for the purpose of a reservoir. It prescribes an independent procedure and was evidently intended to furnish the whole law on the particular subject. I am also of the opinion that the compensation awarded is adequate in view of the evidence taken. If these views are correct they lead to an affirmance of the order appealed from, with costs.